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COURT OF APPEALS
REPORTS

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

ELIZABETH LAIRD PELZER GREEN, F/K/A KELISCHEK, PLAINTIFF
v.
NICHOLAS G. KELISCHEK, DEFENDANT

No. COA13-981

Filed 20 May 2014

1. Appeal and Error—waiver of argument on appeal—inconsistent with trial court argument

Plaintiff's contentions in a child custody action were waived where they were inconsistent with her positions in the trial court. She represented below that her remarriage and proposed relocation did not constitute a substantial change in circumstances and could not assert the contrary on appeal.

2. Child Custody and Support—remarriage and relocation—change of circumstances

Even if plaintiff's arguments had been properly preserved for appeal, the trial court did not err by finding a substantial change of circumstances in plaintiff's remarriage and proposed relocation. The trial court did not rely on plaintiff's remarriage alone in invoking its authority to modify the existing order and did not abandon its responsibility to link individual changes in circumstance to the child's welfare.

3. Child Custody and Support—remarriage and relocation—salutary effects of move—considered by trial court

The trial in a child custody action considered the salutary effects of plaintiff's proposed move, contrary to plaintiff's contention.

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

4. Child Custody and Support—proposed relocation—modification of custody—no abuse of discretion

The trial court did not abuse its discretion in a child custody action by modifying the existing order so that defendant would have school year custody if plaintiff moved to Oregon. Although plaintiff's interpretation of the evidence was different, she did not demonstrate how the trial court abused its discretion in reaching its result.

Appeal by plaintiff from custody order entered 13 February 2013 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 17 February 2014.

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

Steven Kropelnicki, PC, by Steven Kropelnicki, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Elizabeth Laird Pelzer Green (“Plaintiff”) appeals from a custody modification order granting school year custody of her minor child, C.K., to his father, Nicholas G. Kelischek (“Defendant”), in the event Plaintiff moves outside of North Carolina or 125 miles away from Cherokee County. Plaintiff contends that the trial court erred in concluding that a substantial change in circumstances had occurred warranting modification of the parties’ existing custody plan. In the alternative, Plaintiff contends that the trial court erred in concluding that it was in the best interest of C.K. to remain in North Carolina. For the following reasons, we affirm the trial court’s order.

I. Factual & Procedural History

Plaintiff and Defendant married on 27 April 2006, separated in May 2008, and subsequently divorced on 26 April 2010. During the marriage, Plaintiff and Defendant had one child, C.K., who was born in December 2006.

On 25 March 2010, Plaintiff and Defendant entered into a separation agreement, which was incorporated into the decree of divorce to be enforceable as the judgment and order of the trial court. Pursuant to said agreement, each parent shared joint legal custody of C.K. Plaintiff had primary physical custody of C.K. during the week and Defendant

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had physical custody each weekend. By all accounts, Plaintiff and Defendant have, with reasonable adjustments, followed this custody plan since their divorce. C.K., who is now seven years old, has lived with this schedule since the age of two.

The custody plan agreed to by Plaintiff and Defendant is contingent on the parties' residence. Specifically, the separation agreement provides that "[Defendant] and [Plaintiff] agree that . . . he/she will not move more than 125 miles outside of Cherokee County, North Carolina, unless otherwise agreed upon by the parties in writing or upon Order of the Court." Accordingly, at all times since their divorce, C.K. has resided with Plaintiff in Asheville on weekdays and with Defendant in Brasstown on weekends.

On 5 November 2012, Plaintiff filed a motion to modify custody, contending that there had been a substantial change in circumstances impacting C.K. since entry of the original custody order. Defendant moved to dismiss Plaintiff's motion, claiming that the motion was facially deficient, and, in the alternative, moved the trial court to modify custody giving him primary physical custody of C.K. The matter came on for a hearing before the trial court on 14 January 2013. Evidence at the hearing tended to show the following.

Since the parties' divorce, Plaintiff has maintained a residence in Asheville, albeit at three different locations. Plaintiff has not worked since C.K.'s birth and is currently unable to support herself financially. Nevertheless, Plaintiff has been attentive to C.K.'s needs, encouraging C.K. to participate in extracurricular activities and attending to C.K.'s medical needs.

In June 2011, Plaintiff rekindled a romantic relationship with Mr. Dominic Green ("Mr. Green"), a man she dated in high school. Mr. Green currently lives in Portland, Oregon. On 25 May 2012, Plaintiff married Mr. Green. Plaintiff has not relocated to Oregon but desires to do so.¹

Since resuming a relationship with Mr. Green, Plaintiff has traveled to Oregon several times, including trips with C.K. Mr. Green has two children from a previous marriage of which he does not have primary custody. Mr. Green lives in a small condo, but has indicated he will buy a house and provide for Plaintiff and C.K. if they move to Oregon. Neither

1. Plaintiff's motion to modify custody asked the trial court to "award the Plaintiff the primary care and control of the child and [to enter an order concluding] that Plaintiff be allowed to relocate with the minor child to the State of Oregon."

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

Mr. Green nor Plaintiff have extended family in Oregon. C.K.'s maternal grandmother and great-grandmother are in North Carolina.

Since the parties' divorce, Defendant has lived near C.K.'s paternal grandparents in Brasstown and has worked in the family's instrument manufacturing and distribution business. Defendant's housing situation is stable and C.K. has his own room when staying with Defendant. Defendant has consistently exercised his weekend custody of C.K. and has also been attentive to C.K.'s developmental needs. Defendant's extended family is actively involved in C.K.'s life. Defendant is currently engaged to Ms. Misty Taylor ("Ms. Taylor"), whom he has known for three years. Ms. Taylor has met C.K. and has a warm relationship with him.

C.K. is a well-adjusted, healthy, and happy child. C.K. participates actively in extracurricular activities in both Asheville and Brasstown. C.K. is aware that Plaintiff wishes to relocate them to Oregon and is aware that the proposed relocation has placed tension between Plaintiff and Defendant. C.K. exhibited separation anxiety on one occasion when leaving Defendant to return with Plaintiff to Asheville.

C.K. is now old enough to attend school. Anticipating that C.K.'s education would necessitate changes to the custody plan, the parties' separation agreement included the following:

When [C.K.] begins school, [Defendant] and [Plaintiff] agree to negotiate any necessary revisions to the visitation schedule. The parenting schedule will be reviewed each and every year in the month of June and tailored to meet the needs of both parents and [C.K.'s] development.

Notwithstanding this provision, there has been conflict between the parties as to whether C.K. should attend public school or be home-schooled by Plaintiff.

Upon hearing the foregoing and other record evidence, the trial court concluded that there had been a substantial change in circumstances since the entry of the divorce decree warranting modification of the original custody order. Accordingly, by order dated 13 February 2013, the trial court denied Defendant's motion to dismiss and concluded:

That Plaintiff shall be entitled to the school year custody of the minor child and the minor child shall attend school within the Plaintiff's school districts provided the Plaintiff/mother continues to reside within 125 miles of Cherokee County, North Carolina. That should the Plaintiff/mother reside outside of North Carolina or outside of 125 miles

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of Cherokee County, North Carolina, the Defendant/father shall be entitled to the school year custody of the minor child and the minor child shall attend school within the Defendant's school districts.

Plaintiff filed timely notice of appeal.²

II. Jurisdiction & Standard of Review

Plaintiff's appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013).

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and quotation marks omitted). "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and [are] binding on appeal." *Respass v. Respass*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 695 (2014) (citation and quotation marks omitted). Here, Plaintiff has not challenged the trial court's findings of fact, so we consider them binding before this Court.³

However, "[i]n addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. "If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Respass*, ___ N.C. App. at ___, 754 S.E.2d at 695 (citation and quotation marks omitted); *see also Everett v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) ("Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal.").

2. The record on appeal contains two substantively identical custody orders entered by the trial court on 13 February 2013—one entitled "Custody Order" and the other "Defendant's Proposed Order (Custody Order)." Plaintiff's notice of appeal is from both of these orders. Because there is no substantive difference between them, our disposition applies to both. Nevertheless, for ease of interpretation, all references to the trial court's custody modification order are in the singular form.

3. Plaintiff's brief, in passing, challenges portions of Finding of Fact 17, 20, 21, and 22. However, we consider these excerpts unessential to our holding or disposition in this case.

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III. Analysis

In granting a motion to modify custody, the trial court's task is two-fold. First, the trial court must determine that a substantial change in circumstances affecting the minor child has taken place since entry of the existing custody order. *Shipman*, 357 N.C at 474, 586 S.E.2d at 253. Second, the trial court must determine that modification of the existing custody order is in the child's best interests. *Id.* "If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order." *Id.*

On appeal, Plaintiff challenges the trial court's conclusion that a substantial change in circumstances had occurred warranting modification of the original custody order. Alternatively, Plaintiff contends the trial court erred in determining that it was in C.K.'s best interests to stay in North Carolina. We address each of these arguments in turn.

A. Substantial Change in Circumstances

[1] With respect to the trial court's determination that a substantial change in circumstances had taken place, Plaintiff's brief makes three principal arguments: (1) that Plaintiff's proposed relocation does not constitute a substantial change in circumstances; (2) that the trial court erred by failing to make specific findings demonstrating a causal connection between the changed circumstances identified in the trial court's modification order and the welfare of C.K.; and (3) that the trial court acted under a misapprehension of law because it considered only the adverse consequences of Plaintiff's relocation for purposes of determining whether a substantial change in circumstances had taken place.

Notwithstanding Plaintiff's briefing of these issues, we hold that Plaintiff has waived these contentions by taking the opposite position in the trial court below.

Unlike the typical situation where the appellant has obtained an adverse ruling on the substantial change question in the trial court, here, Plaintiff was the movant below and specifically asked the trial court to conclude that a substantial change in circumstances had taken place based on her remarriage and proposed relocation to Oregon. However, because the trial court's subsequent best interests determination did not go as Plaintiff anticipated, Plaintiff now seeks to assert an inconsistent legal position on appeal in order to avoid the modified custody plan set forth in the trial court's order. This she cannot do.

"It is well established that a party to a suit may not change [her] position with respect to a material matter during the course of litigation.

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Especially is this so where the change of front is sought to be made between the trial and the appellate courts.” *Leggett v. Se. People’s Coll.*, 234 N.C. 595, 597, 68 S.E.2d 263, 266 (1951) (internal citations and quotation marks omitted).

Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. . . . According to Rule of Appellate Procedure 10(b)(1), in order to preserve a question for appellate review, the party must state the specific grounds for the ruling the party desires the court to make. The [party] may not change [her] position from that taken at trial to obtain a steadier mount on appeal.

Balawejder v. Balawejder, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011) (internal quotation marks and citation omitted) (first alteration in original). Accordingly, because Plaintiff represented that her remarriage and proposed relocation did constitute a substantial change in circumstances before the trial court, she cannot assert the contrary for the first time on appeal.⁴ Nor can she complain of a ruling she applied for and received from the trial court. See *Garlock v. Wake Cnty. Bd. of Educ.*, 211 N.C. App. 200, 212, 712 S.E.2d 158, 167–68 (2011) (stating that as to invited errors, “[o]ur Courts have long held to the principle that a party may not appeal from a judgment entered on its own motion or provisions in a judgment inserted at its own request. . . . An appellant is not in a position to object to provisions of a judgment which are in conformity with their prayer, and they are bound thereby” (internal quotation marks and citations omitted) (first alteration in original)).

[2] However, even if Plaintiff’s arguments were properly preserved for our review, we find no error in the trial court’s order. By arguments (1) and (2) above, Plaintiff contends that her remarriage and proposed relocation with C.K. is not, in and of itself, a substantial change in circumstances and that the trial court failed to connect the specific changes

4. We note that our holding with respect to this point is distinguishable from our holding in *Hibshman v. Hibshman*, 212 N.C. App. 113, 710 S.E.2d 438 (2011), cited by Plaintiff. In *Hibshman*, we held that a party cannot waive the requirement that the trial court find a substantial change in circumstances because that requirement is not a right held by the litigant, rather, it is a limitation on the authority of the courts to modify custody orders in order to protect the children involved. *Id.* at 125, 710 S.E.2d at 445–46. Here, the trial court did not disregard its duty to determine whether a substantial change in circumstances had occurred, so *Hibshman* is inapposite.

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upon which it relied with evidence concerning how such changes affect C.K.'s welfare.

We have previously held that

remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child. Similarly, 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) (internal citations omitted). Accordingly, in situations where the substantial change involves a discrete set of circumstances, *e.g.*, a parent's relocation, remarriage, etc., "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." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256.

Here, the trial court did make findings regarding Plaintiff's remarriage and proposed relocation, as well as how those actions affect C.K.:

19. . . . Plaintiff/mother married [Mr.] Green on May 25, 2012. She has not relocated to Oregon but desires to do so. She testified that she has no intention of moving to Oregon without [C.K.].

. . . .

35. That the Court finds as fact that [Plaintiff and Defendant] have behaved well and the exchanges on weekends have gone very well until the issue of relocation arose in September 2011. At that time, Defendant/father became very concerned that Plaintiff/mother would try to take [C.K.] further away. Defendant/father was already concerned about not being able to see [C.K.] except on weekends.

36. That the Court finds as fact that when Plaintiff/mother married, the parties determined that mediation was necessary, and Defendant/father initiated scheduling a meeting. . . . Defendant/father believed that it would not be productive to try to resolve the issue without a mediator present.

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37. That the Court finds as fact based on the evidence before it that the Plaintiff/mother complained that Defendant/father failed to communicate with her. The Court finds that the Defendant/father often did not respond to Plaintiff/mother because he did not find it productive to try to negotiate with her without a mediator. He allowed her to make plans for [C.K.] during her time and did not object to activities she had planned for [C.K.]. He trusted her judgment until the relocation issue arose. He then felt disrespected as a result of her decision to try to take [C.K.] so far away from him.

38. The Court finds as fact that as a result of the relocation issue, conflict began to build and [C.K.] became aware of the change in dynamics between Plaintiff/mother and Defendant/father. The minor child is aware that the Plaintiff/mother wanted to move to Oregon. In the past the parents had always stopped at a candy store in Dillsboro, NC, the half way point between them. It was typical for them to spend a half hour talking with [C.K.] about things he was doing and exchanging information about [C.K.'s] life with the other parent. The exchanges became shorter and on one occasion, for the first time, [C.K.] exhibited separation anxiety not wanting to leave his Defendant/father at the end of his time with Defendant/father.

39. That the Court finds as fact based on the evidence presented that the Plaintiff/mother's decisions to marry and move to Portland, Oregon were made not for the benefit of [C.K.], but for the benefit of the Plaintiff/mother. That the Court finds no credible evidence before it that Oregon offers a superior environment, either culturally, educationally or in any other way, to the minor child's home State of North Carolina which would make a move to Oregon advantages [sic] for the minor child.

40. The Court finds as fact based on the evidence presented that the stability of the Plaintiff/mother's plans are a concern. The Plaintiff/mother has stated that she has no intention of leaving [C.K.] in Asheville, and would not move her residence to Oregon without [C.K.]. However, she testified that she intends to continue her relationship with her husband and he will continue to work in Oregon. Plaintiff is in a new marriage and they have not lived

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together for more than three consecutive weeks since the marriage in April 2012. Plaintiff has not been employed for many years and has not been successful in maintaining stable long term employment or relationships. Defendant/father has reasonable grounds for resisting the relocation.

41. The Court finds as fact based on the evidence presented that it is not reasonable for [C.K.] to have to travel four times per year in order to stay with his Defendant/father for a one month period of time. This schedule would cause the minor child to have his residence intermittently upset, to forego a normal school and social environment and make it unnecessarily difficult for him to have friends and consistent activities. The court finds that this arrangement would not foster stability for [C.K.] or be in his best interest.

These findings directly link Plaintiff's remarriage and relocation to changes in C.K.'s life, namely, the growing tension between Plaintiff and Defendant, the resulting effect of that tension on C.K., the interference with C.K.'s educational and social development, and the likelihood that C.K. would be subjected to a less stable environment in Oregon.

The trial court's order also made findings of fact regarding Defendant's engagement and the effect of that relationship on C.K., as well as changes in C.K.'s educational needs as he reaches school age:

30. Evidence was before the court and the Court finds as credible, that the Defendant/father became recently engaged to [Ms.] Taylor, a woman he has known for about three years. . . . Ms. Taylor testified and the Court finds that she and [C.K.] have a warm relationship and that she is ready to be a stepparent to him.

. . . .

42. The Court finds, and common sense dictates, that the needs of a very young child may change significantly as that child moves from infancy to school age. Even a short period of time in the life of a young child, can require a readjustment to appropriately meet the child's developmental needs and overall best interests. The parties to this action clearly anticipated in their Agreement/Court Order that when [C.K.] started school the visitation would be renegotiated. That the terms of the agreement now Order

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of April 26, 2012 regarding child custody issues were specific in many regards and included terms which are relevant to the matters before the Court:

- a. The stand alone paragraph entitled Residence states: “The Husband and Wife agree to that he/she will not move more than 125 miles outside of Cherokee County, North Carolina, unless otherwise agreed upon by the parties in writing or upon Order of the Court.”
- b. Paragraph 17. reads in part: “When [C.K.] begins school the [Defendant] and [Plaintiff] agree to negotiate any necessary revision to the visitation schedule. The parenting schedule will be reviewed each and every year in the month of June and tailored to meet the needs of both parents and [C.K.’s] development.”

These changes were also considered by the trial court in its substantial change of circumstances analysis.

Furthermore, the order explicitly acknowledged our precedent regarding remarriage and relocation, stating:

43. The Court recognizes that the requested relocation of the Plaintiff is not, in and of itself a substantial change in circumstances which warrants a modification of the custody of the minor child, absent a finding that it is likely that the relocation to Portland would have an adverse effect on [C.K.]. The Court finds as fact based on the evidence presented that because of the close relationship [C.K.] has with his Defendant/father and the extended family in North Carolina that the loss of ongoing, stable, consistent, weekly contact between the Defendant and the minor child would indeed have an adverse affect [sic] on the minor child. It is not in the best interest of the minor child’s development that he be relocated to Oregon.

Based on these and other finding of facts, the trial court concluded:

4. . . . that there has been a substantial change in circumstances impacting the welfare of the minor child since the entry of the last Order of April, 26, 2010, which warrants modification of the current custody schedule of the child and that such a modification is in the best interest of the minor child.

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Accordingly, the trial court did not rely on Plaintiff's remarriage and relocation alone in invoking its authority to modify the existing custody order. Nor did the trial court abandon its responsibility to link individual changes in circumstance with C.K.'s welfare. Plaintiff's arguments on these points are therefore without merit.

[3] By argument (3) above, Plaintiff contends that the trial court acted under a misapprehension of law because it only considered the adverse consequences of Plaintiff's remarriage and relocation and not any salutary affects appertaining thereto. Again, Plaintiff's argument is without merit.

[C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

Pulliam v. Smith, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998). Here, although the trial court stated in Finding on Fact 43 that it could not modify custody based on Plaintiff's relocation "absent a finding that it is likely that the relocation to Portland would have an adverse effect on [C.K.]," other language in the trial court's order indicates that it did not abandon its responsibility to consider salutary effects of Plaintiff's relocation on C.K.'s welfare. Specifically, Finding of Fact 39 states, in part:

39. . . . [T]he Court finds no credible evidence before it that Oregon offers a superior environment, either culturally, educationally or in any other way, to the minor child's home State of North Carolina which would make a move to Oregon advantages [sic] for the minor child.

Thus, the trial court did consider the salutary effects of Plaintiff's relocation for purposes of determining whether a substantial change in circumstances had taken place. We will not presume error based on an errant sentence found in Finding of Fact 43.

In summary, we hold that Plaintiff has waived her contention that the trial court erred in concluding that a substantial change in circumstances had taken place since entry of the original custody order. Even so, assuming *arguendo* that this question is properly before us, we would affirm the trial court's conclusion regarding changed circumstances.

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B. Best Interests of the Child

[4] Plaintiff's second argument on appeal is that the trial court erred in determining that it was in C.K.'s best interests to remain in North Carolina.

"It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902.

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. Under an abuse of discretion standard, we must determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.

Stephens v. Stephens, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) (internal quotation marks and citations omitted).

In evaluating the best interests of a child in a proposed relocation, "[t]he welfare of the child is the 'polar star' which guides the court's discretion." *Evans*, 138 N.C. App. at 141, 530 S.E.2d at 580. Factors that may be considered by the trial court include, for example:

[T]he advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the non-custodial parent.

Id. at 142, 530 S.E.2d at 580 (quotation marks and citation omitted).

Here, the trial court made the following findings of fact pertinent to C.K.'s best interests:

26. The Court finds as fact based on the evidence presented that neither the Plaintiff/mother nor Mr. Green have any extended family in Portland Oregon. The Court finds that the minor child has extensive maternal family

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connections in North Carolina. [C.K.'s] maternal grandmother visits about once or twice each month and [C.K.] sees his maternal great-grand-mother about every two months. He visits with his maternal grandfather about twice each year.

27. The Court finds as fact based on the evidence presented that the Defendant/father has consistently exercised his primary physical custody of [C.K.] on weekends. The Court finds as fact based on the evidence, that the minor child and the Defendant/father have a loving and close relationship. All the evidence before the Court was that this warm relationship includes the larger immediate paternal family that lives in the area of the Defendant/father's home and residence.

28. The Court finds as fact based on the evidence presented that the community in which the Defendant/father lives and works is a unique and enriching artistic environment. That the Defendant/father and his brothers grew up actively participating in music and in classes at the school. Defendant/father has many friends in the arts community and he actively spends time with his friends. He is involved in a dance team there. [C.K.] always participates in these activities and has now made friends there. They have no television, but do have Internet access. They have dinner with [C.K.'s] grandparents on Saturday evenings, and [C.K.] spends time with his paternal grandparents every weekend. The Defendant/father's home is a stable place that would benefit [C.K.]. Defendant/father has provided many enrichment activities for [C.K.]. [C.K.] has a rich life in the Kelischek community that would likely be diminished greatly if he were to move to Oregon.

29. The Court finds as fact based on the evidence presented that the Defendant/father has been employed in his family's business since the divorce. They make and distribute musical instruments all over the world. Several family members are employed there. Defendant/father is in charge of the Internet sales, but also works in any other capacity as may be necessary from time to time. His work schedule is Monday through Friday, although, he has for the last several years taken off early to pick up [C.K.] every Friday. Defendant/father now lives in a home close

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to his parents. The house has a separate suite in the basement where his nephew and wife now reside. [C.K.] now has his own separate bedroom that he sleeps in when at the Defendant's home.

. . . .

31. That the Court finds as fact based on the evidence before it that the Defendant/father has shown a real and demonstrable dedication to his extended family. . . . Though [C.K.'s] first cousins are much older than him, they interact frequently with him [and] have a warm relationship with him. These first cousins grew up in Asheville, and have been very involved in music and arts in the Brasstown community, and it appears that they have benefitted from the involvement in the Brasstown community and the culture of the extended family. [C.K.'s] aunt, a physician, lives in Asheville. The Court finds as fact based on the evidence presented that [C.K.] has benefitted from the time he spends with this extended family, and he has good relationships with them.

. . . .

39. That the Court finds as fact based on the evidence presented that the Plaintiff/mother's decisions to marry and move to Portland, Oregon were made not for the benefit of [C.K.], but for the benefit of the Plaintiff/mother. That the Court finds no credible evidence before it that Oregon offers a superior environment, either culturally, educationally or in any other way, to the minor child's home State of North Carolina which would make a move to Oregon advantages [sic] for the minor child.

40. The Court finds as fact based on the evidence presented that the stability of the Plaintiff/mother's plans are a concern. The Plaintiff/mother has stated that she has no intention of leaving [C.K.] in Asheville, and would not move her residence to Oregon without [C.K.]. However, she testified that she intends to continue her relationship with her husband and he will continue to work in Oregon. Plaintiff is in a new marriage and they have not lived together for more than three consecutive weeks since the marriage in April 2012. Plaintiff has not been employed for many years and has not been successful in maintaining

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stable long term employment or relationships. Defendant/father has reasonable grounds for resisting the relocation.

41. The Court finds as fact based on the evidence presented that it is not reasonable for [C.K.] to have to travel four times per year in order to stay with his Defendant/father for a one month period of time. This schedule would cause the minor child to have his residence intermittently upset, to forego a normal school and social environment and make it unnecessarily difficult for him to have friends and consistent activities. The court finds that this arrangement would not foster stability for [C.K.] or be in his best interest.

....

43. . . . The Court finds as fact based on the evidence presented that because of the close relationship [C.K.] has with his Defendant/father and the extended family in North Carolina that the loss of ongoing, stable, consistent, weekly contact between the Defendant and the minor child would indeed have an adverse affect [sic] on the minor child. It is not in the best interest of the minor child's development that he be relocated to Oregon.

Plaintiff does not challenge these findings of fact with argument on appeal. Rather, Plaintiff points to other record evidence that would tend to support relocation and emphasizes the burden that remaining in North Carolina will place on her new marriage. While Plaintiff's interpretation of the record evidence is understandably different than the trial court, she has failed to demonstrate how the trial court abused its discretion in reaching its result, particularly in light of the above unchallenged findings of fact.

Importantly, by holding that the trial court did not abuse its discretion, we do not diminish the other findings of fact demonstrating Plaintiff's love and commitment to her son. Nor do we deny the existence of record evidence that suggests there would be benefits in allowing Plaintiff to move to Oregon with C.K. Rather, our holding recognizes the broad discretion given to the trial court in child custody matters and emphasizes our standard of review on appeal. As our Supreme Court has noted:

The trial court has the opportunity to see the parties in person and to hear the witnesses, and its decision ought

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not be upset on appeal absent a clear showing of abuse of discretion. The trial court can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges.

Pulliam, 348 N.C. at 625, 501 S.E.2d at 902–03 (alterations, quotation marks, and internal citations omitted). Accordingly, because Plaintiff has failed to demonstrate that the trial court’s best interests determination was “manifestly unsupported by reason” or “so arbitrary that it could not have been the result of a reasoned decision,” we affirm the trial court’s decision to modify the existing custody order such that Defendant is entitled to school year custody of C.K. if Plaintiff moves to Oregon.

IV. Conclusion

For the foregoing reasons, we affirm the order of the trial court modifying custody of Plaintiff and Defendant’s minor child.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

HUTTIG BUILDING PRODUCTS, INC., PLAINTIFF
v.
ANGUS ALLAN McDONALD, JR., DEFENDANT

No. COA13-1419

Filed 20 May 2014

Appeal and Error—appealability—jurisdiction—not an aggrieved party

Defendant’s appeals from the trial court’s order which required BB&T to release funds from defendant’s joint bank accounts to plaintiff Huttig Building Products, Inc. was dismissed. Defendant admitted that he had no interest in the challenged funds. Thus, the Court of Appeals lacked jurisdiction since defendant was not a party aggrieved by the trial court’s order.

Appeal by defendant from order entered 13 August 2013 by Judge Michael J. O’Foghludha in Wake County Superior Court. Heard in the Court of Appeals 7 April 2014.

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[234 N.C. App. 17 (2014)]

Smith, Debnam, Narron, Drake, Saintsing & Myers, LLP, by Gerald H. Groom, Jr., for plaintiff-appellee.

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

CALABRIA, Judge.

Angus Allan McDonald, Jr. (“defendant”) appeals from the trial court’s order which required Branch Banking and Trust Company (“BB&T”) to release funds from defendant’s joint bank accounts to Huttig Building Products, Inc. (“plaintiff”). We dismiss the appeal.

On 10 May 2012, the Wake County District Court entered a judgment in favor of plaintiff against defendant in the amount of \$31,985.58 plus interest and attorney’s fees. On 5 November 2012, plaintiff filed a motion with the Wake County Clerk of Superior Court (“the Clerk”) seeking, *inter alia*, an order compelling BB&T to turn over any funds in its possession that belonged to defendant to plaintiff’s counsel to be applied to the judgment. On 8 January 2013, the Clerk entered an order directing BB&T to release \$9,089.69 from defendant’s various accounts with BB&T to plaintiff, by and through its attorneys.

Defendant appealed the Clerk’s order to the Wake County Superior Court. After a hearing, the trial court entered an order directing BB&T to release the \$9,089.60 in defendant’s accounts to plaintiff, by and through its attorneys. Defendant appeals.

Defendant’s sole argument on appeal is that the trial court erred by ordering BB&T to release all of the funds from four BB&T accounts that defendant held jointly with other family members. Defendant contends that he “has no interest in the BB&T accounts because [defendant]’s elderly mother and teenaged children contributed all of the funds to the BB&T accounts.”

However, we are unable to consider defendant’s argument because “only a ‘party aggrieved’ may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court.” *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). If, as defendant has admitted, he has no interest in the challenged funds, defendant likewise has no interest which would allow him to appeal the trial court’s order. Defendant’s rights were not directly or injuriously affected when the trial court directed the BB&T funds, which defendant acknowledges he did not own, to be

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turned over to plaintiff. Thus, he will receive no benefit from a reversal of the trial court's order. Instead, the funds at issue would be restored to a nonparty¹ and defendant would remain liable to plaintiff for the portion of his prior judgment that the BB&T funds were intended to satisfy.

In *Langley v. Gore*, 242 N.C. 302, 87 S.E.2d 519 (1955), the appeal was “directed solely to the judgment of the court below in respect to disposition of the fund of money in the hands of the Clerk of Superior Court.” *Id.* at 303, 87 S.E.2d at 520. The Court concluded that the defendant-appellants were not a party aggrieved because there was

nothing in the record to show that defendants have any interest in, or claim to [the funds at issue]. Indeed, defendants say in their brief, filed on this appeal, that they “did not claim the fund as theirs personally.” They assert, however, reasons why they think plaintiffs are not entitled to the fund.

Id. Consequently, the *Langley* Court dismissed the appeal *ex mero motu*.

In the instant case, defendant, like the defendants in *Langley*, expressly disclaims any interest in the funds at issue in this appeal and instead “assert[s] . . . reasons why [he] think[s] plaintiff[is] not entitled to the fund.” *Id.* Thus, we are bound by *Langley* to conclude that defendant is not a party aggrieved by the trial court's order. Accordingly, we lack jurisdiction to consider defendant's challenges to the court's order and must dismiss defendant's appeal. See *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (per curiam) (“Where a party is not aggrieved by the judicial order entered . . . his appeal will be dismissed.”).

Dismissed.

Chief Judge MARTIN and Judge McGEE concur.

1. None of the individuals that defendant identified as the true owners of the funds in the shared joint accounts at issue attempted to intervene in the instant case. Additionally, neither party made a motion to join these joint account holders as necessary parties.

IN RE DUKE ENERGY CORP.

[234 N.C. App. 20 (2014)]

IN THE MATTER OF INVESTIGATION REGARDING THE APPROVAL AND CLOSING
OF THE BUSINESS COMBINATION OF DUKE ENERGY CORPORATION AND
PROGRESS ENERGY, INC.

No. COA13-880

Filed 20 May 2014

1. Utilities—Utilities Commission—exceeded authority—dismissed appeal

The Utilities Commission exceeded its authority by dismissing proposed intervenor North Carolina Waste Awareness and Reduction Network, Inc.'s appeal, including its appeal from an intervention order, for lack of standing.

2. Utilities—Utilities Commission—investigation—intervention denied—no standing to appeal

Proposed intervenor North Carolina Waste Awareness and Reduction Network, Inc. was properly denied intervention into an investigation conducted by the Utilities Commission and lacked standing to appeal from the settlement order between the parties to that investigation.

Appeal by proposed intervenor from orders entered 13 July 2012, 12 December 2012, and 29 April 2013 by the North Carolina Utilities Commission. Heard in the Court of Appeals 11 December 2013.

No brief filed on behalf of appellee State of North Carolina ex rel. Utilities Commission.

Chief Counsel Antoinette R. Wike for appellee Public Staff -- North Carolina Utilities Commission.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn; and John D. Runkle, for proposed intervenor-appellant North Carolina Waste Awareness and Reduction Network, Inc.

Womble Carlyle Sandridge & Rice, LLP, by James P. Cooney III; Allen Law Offices, PLLC, by Dwight W. Allen; and Duke Energy Corporation, by Deputy General Counsel Lawrence B. Somers, for appellees Duke Energy Corporation, Duke Energy Carolinas, LLC, and Duke Energy Progress, Inc. (formerly Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.).

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GEER, Judge.

Proposed intervenor North Carolina Waste Awareness and Reduction Network, Inc. (“NC WARN”) appealed two orders of the North Carolina Utilities Commission (1) denying NC WARN’s motion to intervene in an investigation conducted by the Commission and (2) approving a settlement agreement by the parties to the investigation and closing the investigation. The Commission entered an order dismissing that appeal on the grounds that NC WARN lacked standing to appeal. NC WARN has appealed the dismissal order.

We hold that the Commission acted in excess of its jurisdictional authority in dismissing NC WARN’s appeal for lack of standing, and we, therefore, vacate that order as void ab initio and address the merits of NC WARN’s first appeal. We hold that the Commission properly denied NC WARN’s motion to intervene and, therefore, affirm the order denying intervention. Since NC WARN was not a party to the Commission’s investigation and had no standing to appeal from the settlement order, we also affirm that order.

Facts

On 4 April 2011, Duke Energy Corporation and Progress Energy, Inc. filed an application requesting that the Commission approve their proposed merger (the “merger docket”). The companies indicated in the application that William D. Johnson would be named president and CEO of the merged company (“Duke”) for a three-year term. Mr. Johnson filed written testimony in the merger docket stating he would be president and CEO of Duke, and James Rogers filed testimony stating he would be the executive chairman of Duke’s board of directors. On 29 June 2012, the Commission entered an order approving the merger subject to regulatory conditions and code of conduct. Duke closed the merger on 2 July 2012. The next day, on 3 July 2012, Duke announced that Mr. Rogers would replace Mr. Johnson as president and CEO of the company.

On 6 July 2012, the Commission opened an investigation, pursuant to N.C. Gen. Stat. § 62-37 (2011), into the change in leadership immediately following the merger. NC WARN filed a motion to intervene in the investigation on 10 July 2012, alleging it was a non-profit corporation, with approximately 1,000 individual members, established for the purpose of “reduc[ing] hazards to public health and the environment from nuclear power and other polluting electricity production through energy efficiency and renewable energy resources.”

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The motion alleged that most of NC WARN's members resided in North Carolina and were customers of Duke, and its members were "concerned about the merger's potential impacts on the cost of their electricity." NC WARN stated that it had intervened in the merger docket, and that if allowed to intervene in the investigation, it would "assist and support the Commission." Attached to the intervention motion were NC WARN's "initial scoping comments to assist the Commission in defining the investigation."

On 13 July 2012, the Commission entered an order denying NC WARN's motion to intervene. The order explained that the proceeding was "an investigation pursuant to the Commission's supervisory authority under Article 3 of Chapter 62 [of the General Statutes], rather than an application or rate case being conducted pursuant to the Commission's authority under Article 4." The Commission also found that "NC WARN is not a party affected within the meaning of G.S. 62-37, requiring the Commission to 'make no order without affording the parties affected thereby notice and a hearing.'"

Relying on *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 163 N.C. App. 1, 592 S.E.2d 277 (2004) (hereinafter "*CUCA*"), the Commission further found that its "order in this proceeding will have only a generalized effect on NC WARN's members, no more and no less than it will have on all of Duke's and Progress' ratepayers." In addition, the Public Staff of the North Carolina Utilities Commission ("Public Staff") and the Attorney General were parties to the investigation, and the Commission found that those parties "represent the interest of all consumers who will be affected by the Commission's investigation."

On 29 November 2012, the Staff of the North Carolina Utilities Commission, the Public Staff, and Duke entered into a settlement agreement regarding the investigation. The agreement provided that Mr. Rogers, Mr. Johnson, and other individuals had testified before the Commission during the investigation; that Duke had filed thousands of pages of documents with the Commission pursuant to orders during the investigation; and that the parties desired to resolve "all matters and issues . . . without further litigation and expense and to move forward in a positive manner." The terms of the settlement agreement included that: (1) Duke maintain certain staff in Raleigh; (2) Duke create a board committee for regulatory compliance; (3) Duke provide retail ratepayers an "additional \$25 million in fuel and fuel-related cost savings" and contribute "an additional \$5 million to workforce development and low-income assistance," each on top of amounts provided for in the merger order; (4) Duke make certain executive-level staffing changes; (5) Duke bring

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in two new outside board members and retire current board members in a certain manner; (6) Mr. Rogers retire in December 2013 and the new top executive be hired from outside the company; and (7) Duke “issue a statement of acknowledgement to the Commission that its activities have fallen short of the Commission’s understanding of Duke’s obligations under its regulatory compact that frame the duties for a regulated utility in this state.”

Although denied intervention, NC WARN continued to file comments in the investigation docket during the investigation, and NC WARN filed a motion opposing the settlement agreement on 3 December 2012. The Commission entered an order approving the settlement agreement and closing the investigation on 12 December 2012. The order provided that the “integrity of the Commission to carry out its statutory mandate relies on the openness and honesty of the regulated public utilities” The order further provided, however, that the settlement agreement “restore[d] the balance between legacy Duke and legacy Progress in the merged company . . . , reaffirm[ed] the regulatory compact and continued public confidence in the integrity of utility regulation, and allow[ed] the merged company to focus on its mission to provide affordable, reliable electric service to North Carolina consumers.”

On 9 January 2013, NC WARN timely appealed the intervention order and the settlement order. Prior to NC WARN’s service of the proposed record on appeal, Duke filed a motion to dismiss NC WARN’s appeal with the Commission on 7 March 2013. The Commission entered an order dismissing NC WARN’s appeal for lack of standing on 29 April 2013.

The majority of the Commission concluded that NC WARN had no right to intervene in the investigation under *CUCA*, and, as a non-party, NC WARN had no right to appeal. The majority further determined that it had jurisdiction to dismiss NC WARN’s appeal for lack of standing. It reasoned that under N.C. Gen. Stat. § 62-90(c) (2011) and *Farm Credit Bank of Columbia v. Edwards*, 121 N.C. App. 72, 464 S.E.2d 305 (1995), the Commission retained certain jurisdiction over appealed orders until the appeal is docketed in the appellate court, including jurisdiction to dismiss an appeal by a non-party.

Commissioner ToNola D. Brown-Bland concurred in the result. Commissioner Brown-Bland reasoned that because the investigation was pursuant to the Commission’s Article 3 powers and was wholly separate from the Commission’s Article 4 judicial function, the only party affected by the investigation was necessarily Duke, the party investigated, since there was no assertion by any party during the investigation that the

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public's interests were not adequately protected. Accordingly, only Duke could appeal the settlement order. Commissioner Brown-Bland, like the majority, believed the Commission could dismiss NC WARN's appeal, an appeal by an unaffected non-party, as a nullity, although she additionally concluded that the Commission could dismiss the appeal under Rule 25 of the Rules of Appellate Procedure.

Commissioner Bryan E. Beatty dissented because, while he agreed that the Commission properly denied NC WARN's intervention motion, he disagreed that the Commission had the authority to dismiss NC WARN's appeal from the intervention order. Commissioner Beatty reasoned that N.C. Gen. Stat. § 62-90(a) did not limit NC WARN, a non-party, from appealing since that statute was limited to a "final order or decision" and the intervention order was an interlocutory procedural order. He further reasoned that Rule 25 of the Rules of Appellate Procedure did not give the Commission authority to dismiss the appeal for lack of standing because that rule was limited to dismissals for failure to take timely action, and there was no allegation NC WARN had not timely taken and perfected its appeal.

Commissioner Beatty noted that, although the Commission properly exercised its discretion in denying NC WARN intervention, "the majority's decision to dismiss NC WARN's appeal of that ruling on that same basis gives the appearance that the majority is acting as an appellate court in affirming its own exercise of discretion." Since Duke had cited no authority directly stating the Commission had the power to dismiss NC WARN's appeal from the intervention order, Commissioner Beatty "would follow the more cautious route and leave th[e] question to the appellate court."

On 16 May 2013, NC WARN timely appealed the order dismissing its first appeal and, in the same notice of appeal, again appealed the intervention order and settlement order. On the same day, 16 May 2013, NC WARN filed a petition for writ of certiorari in this Court seeking review of the order dismissing its first appeal. This Court entered an order denying NC WARN's petition on 4 June 2013. Duke filed a motion to dismiss NC WARN's second appeal in this Court on 7 August 2013.

I

[1] We first address the Commission's order dismissing NC WARN's first appeal, including its appeal from the intervention order, for lack of standing. NC WARN argues, both in its brief and in response to Duke's motion to dismiss filed in this Court, that the Commission did not have jurisdiction to dismiss its first appeal for lack of standing. We agree.

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In reviewing an order by the Commission, this 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) [i]n violation of constitutional provisions, or (2) [i]n excess of statutory authority or jurisdiction of the Commission, or (3) [m]ade upon unlawful proceedings, or (4) [a]ffected by other errors of law, or (5) [u]nsupported by competent, material and substantial evidence in view of the entire record as submitted, or (6) [a]rbitrary or capricious.” N.C. Gen. Stat. § 62-94(b) (2013).

“The general rule is that an appeal takes the case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the trial judge is *functus officio*.” *Estrada v. Jaques*, 70 N.C. App. 627, 637, 321 S.E.2d 240, 247 (1984). This general rule is, however, “subject to two exceptions and one qualification[.]” *Id.*

“The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned and thereby regain jurisdiction of the cause.”

Id. at 637-38, 321 S.E.2d at 247 (quoting *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977)).

While it retains jurisdiction over an appealed matter, a trial tribunal may dismiss an appeal under the circumstances provided for in Rule 25 of the Rules of Appellate Procedure. Rule 25 provides in relevant part:

(a) *Failure of appellant to take timely action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall

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be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

This Court interpreted the scope of Rule 25 in *Estrada*, where the trial court dismissed an appeal on the grounds that the appealed order was interlocutory. 70 N.C. App. at 639, 321 S.E.2d at 248. The Court explained: “Taken out of context, the second sentence of the Rule might provide the trial court with authority to dismiss interlocutory appeals. However, elementary principles of construction require that words and phrases be interpreted contextually and in harmony with the underlying purposes of the whole.” *Id.* The Court reasoned: “The title and first and third sentences clearly indicate that the motions described in the second sentence are *only* those for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal.” *Id.*

In *Estrada*, the plaintiff appealed “various orders” prior to final judgment being entered as to all claims and parties, and the trial court dismissed the plaintiff’s appeal as interlocutory. *Id.* at 637, 321 S.E.2d at 247. This Court then reviewed on appeal whether the trial court had jurisdiction to dismiss the plaintiff’s appeal. *Id.* This Court laid out the above rules for a trial court’s continued jurisdiction over an appealed matter and determined that the exceptions and qualification did not apply. *Id.* at 638, 321 S.E.2d at 248. The Court concluded that, given its interpretation of Rule 25, the trial court did not have jurisdiction under Rule 25 to dismiss the appeal on the grounds that the appeal was interlocutory. *Id.* at 639, 321 S.E.2d at 248. Consequently, the Court held, the trial court “acted beyond [its] authority in dismissing the appeal.” *Id.*

Here, there is similarly no contention that NC WARN abandoned its first appeal or that the order dismissing NC WARN’s first appeal was in any way related to settling the record on appeal. However, with respect to the “exception” in which a trial court maintains jurisdiction over an appealed matter during the session in which the appealed order was rendered, the Commission’s order provided that “[i]n contrast to a Superior Court judge, the Utilities Commission never loses jurisdiction over its cases before appeals are docketed in the appellate court due to termination of a term of court.” The order cited N.C. Gen. Stat. § 62-90(c) in

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support of that distinction. *See id.* (“The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.”). The Commission further reasoned that its jurisdiction over appealed orders was “more pervasive than the General Court of Justice, especially in its investigation determinations under Article 3.”

The Commission’s order additionally provided: “North Carolina recognizes an exception to the rule that a lower tribunal loses jurisdiction upon notice of appeal so as to permit the lower tribunal to modify its judgment *thereby also permitting it to retain jurisdiction to dismiss an appeal.*” (Emphasis added.) In support of this latter proposition, the Commission cited *Farm Credit Bank* as support for its position that “[e]ven where the retention by the trial court of jurisdiction after notice of appeal may be circumscribed for settling the record on appeal, the courts have permitted the use of this limited jurisdiction to dismiss an appeal.”

However, *Farm Credit Bank* does not stand for the proposition that simply because a trial tribunal retains jurisdiction over a matter in order to settle the record on appeal, the trial tribunal is empowered to dismiss the appeal for reasons *unrelated* to settling the record during that time. Rather, the *Farm Credit Bank Court* held that the trial court had jurisdiction over a motion to dismiss an appeal as being unauthorized because (1) that issue was expressly made an objection to the proposed record on appeal, (2) the plaintiff consented to the trial court addressing the matter, and (3) the plaintiff waived any objection to the jurisdictional issue by requesting affirmative relief from the trial court on other matters. 121 N.C. App. at 77, 464 S.E.2d at 307-08.

We note that *Farm Credit Bank’s* reasoning is directly contrary to the well-established principle that “[s]ubject matter jurisdiction ‘cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial.’” *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967)). Nevertheless, the validity of the *Farm Credit Bank Court’s* reasoning aside, that opinion’s holding simply does not support the Commission’s assertion that the Commission’s continuing jurisdiction over certain matters, such as jurisdiction to hold a further hearing on exceptions set out in a notice of appeal under N.C. Gen. Stat. § 62-90(c), necessarily gives the Commission the authority to dismiss an appeal for reasons unrelated to the specific nature of that continued jurisdiction.

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Moreover, the Commission's broad reading of *Farm Credit Bank* conflicts with the analysis in *Estrada*. In *Estrada*, the Court explained that since the session of the term of the appealed order had ended and there was no allegation that the plaintiff had abandoned the appeal or failed to timely take action with respect to the appeal, "the Superior Court had jurisdiction on [the day the defendants moved to dismiss the appeal] only for the purpose of settling the case on appeal." 70 N.C. App. at 638, 321 S.E.2d at 248.

The Court went on to hold that because the trial court's order dismissing the appeal as interlocutory had nothing to do with settling the record on appeal, the order went beyond the court's authority. *Id.* at 638, 639, 321 S.E.2d at 248. Since *Farm Credit Bank* could not overrule *Estrada*, see *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we do not read *Farm Credit Bank* as providing a trial tribunal jurisdiction to dismiss an appeal during a time of continued jurisdiction for a reason unrelated to that continued jurisdiction apart from the trial tribunal's limited power to dismiss appeals as provided in Rule 25.

Thus, the Commission was correct that it had some continued jurisdiction over the orders at issue in NC WARN's first appeal, N.C. Gen. Stat. § 62-90(c). However, that continued jurisdiction allowed the Commission to dismiss NC WARN's appeal only based on the grounds specified in Rule 25.

We initially observe that because NC WARN's first appeal had not yet been docketed with this Court, Duke's motion to dismiss the appeal was properly made to the Commission. N.C.R. App. P. 25(a). *Estrada* held that Rule 25 gives a trial court authority to dismiss an appeal, prior to docketing in the appellate court, "only . . . for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal." 70 N.C. App. at 639, 321 S.E.2d at 248. There is no dispute in this case that NC WARN's first notice of appeal was timely filed, that NC WARN timely complied with all appellate rules concerning its appeal, and that NC WARN properly perfected its appeal. Consequently, the Commission's order dismissing NC WARN's first appeal was not properly based upon Rule 25.

The Commission determined, however, that it nonetheless had jurisdiction to dismiss NC WARN's appeal under the rule stated by our Supreme Court in *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 361, 365, 230 S.E.2d 671, 674 (1976) that "an attempted appeal from a nonappealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction." That rule does not support the

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Commission's order, however, because the authority to ignore an appeal from a nonappealable order and proceed as if no appeal had been taken is not equivalent to authority to dismiss the appeal itself. In *Edmisten*, the Supreme Court held that the intervenor's appeal from a nonappealable order did not divest the Commission of jurisdiction over the appealed order, and, therefore, the Commission "was not deprived of authority later to modify this order." *Id.* Notably, however, the Commission in *Edmisten* did not attempt to dismiss the appeal, and it was this Court that held, in a different opinion, that the appealed order was interlocutory and, therefore, nonappealable. *Id.* at 363-64, 230 S.E.2d at 673.

Finally, the Commission's order was based on the reasoning that it could dismiss the appeal of any non-party to the proceeding, including NC WARN, since a non-party has no statutory right to appeal. This Court has, however, recognized a non-party's right to appeal from an order denying the non-party's motion to intervene, despite the fact that the non-party is, by virtue of the appealed order, not a party to the case. See *Procter v. City of Raleigh Bd. of Adjustment*, 133 N.C. App. 181, 184, 514 S.E.2d 745, 747 (1999) (holding proposed intervenors had standing to appeal order denying motion to intervene under Rule 24 of Rules of Civil Procedure, reversing intervention order, and remanding for entry of order allowing intervention). See also *State ex rel. Easley v. Philip Morris Inc.*, 144 N.C. App. 329, 334-35, 548 S.E.2d 781, 784 (2001) (reviewing merits of proposed intervenor's appeal from order denying motion to intervene and affirming denial of intervention).

If sustained, the Commission's position that it should be permitted to dismiss NC WARN's appeal from its order denying NC WARN's motion to intervene since NC WARN was a non-party would deprive NC WARN of appellate review of the denial of its motion to intervene. The Commission's decision would be insulated from review. We do not believe the General Assembly intended that result. We, therefore, hold that the Commission exceeded its authority in dismissing NC WARN's appeal for lack of standing.

In *Estrada*, after holding that the trial court had no authority to dismiss the plaintiff's appeal as interlocutory, the Court noted: "Depending on our interpretation of the legal basis of the order [dismissing the plaintiff's appeal], we could either: (1) treat [the plaintiff's] appeal as an application for certiorari, grant same, and consider the merits; or (2) treat the order as in excess of authority and void *ab initio*, and consider the purported appeal, assuming the substantial right doctrine applies [to the interlocutory appeal], as properly before us." 70 N.C. App. at 640, 321 S.E.2d at 249 (internal citations omitted).

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The Court held, however, that it was unable to treat the plaintiff's appeal as a petition for writ of certiorari because the plaintiff had already petitioned the Court for a writ of certiorari to review the order dismissing his appeal, a separate panel of the Court had previously denied that petition, and the *Estrada* Court was bound by the prior decision denying the petition to review the same order. *Id.* at 640-41, 321 S.E.2d at 249. The Court further held that although it could treat the order dismissing the appeal as void ab initio and consider the merits of the appeal, the appeal at issue was interlocutory and, since a prior panel of the Court had also denied the plaintiff's separate petition for writ of certiorari to review the orders underlying the first appeal, the *Estrada* Court was unable to conclude that the appeal affected a substantial right. *Id.* at 641, 321 S.E.2d at 249. Consequently, the Court dismissed the plaintiff's appeal of the interlocutory orders. *Id.*

In this case, as in *Estrada*, NC WARN has already filed a petition for writ of certiorari in this Court seeking review of the Commission's order dismissing its first appeal. A separate panel of this Court has denied that petition. We may not, therefore, treat NC WARN's appeal as a petition for writ of certiorari and allow it in order to reach the merits of NC WARN's appeal from the underlying orders. There is no impediment, however, to our treating the Commission's order "as in excess of authority and void ab initio, and consider[ing] the purported appeal . . . as properly before us." *Id.* at 640, 321 S.E.2d at 249.

We, therefore, hold that the Commission's order dismissing NC WARN's first appeal is void ab initio and we treat NC WARN's first appeal, from the intervention order and settlement order, as properly before us. In light of our holding, we need not address the sufficiency of NC WARN's second appeal from the intervention order and the settlement order.

II

[2] We next address NC WARN's appeal from the order denying its motion to intervene. We initially observe that NC WARN does not substantively challenge, in its brief, the Commission's order denying NC WARN's motion to intervene as of the time the order was entered. Although NC WARN makes an unsupported assertion that "the Commission's denial of NC WARN's Motion to Intervene was improper because NC WARN had standing to participate in this case," that bare contention, without any supporting authority or argument, is insufficient to raise the issue of the merits of the intervention order at the time it was entered. N.C.R. App. P. 28(b)(6).

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Rather than arguing that the intervention order was erroneous when entered, NC WARN contends that the Commission's subsequent settlement order affected NC WARN, thereby giving rise to NC WARN's standing to intervene in this investigation docket. Since NC WARN has abandoned its right to substantively challenge the intervention order, we affirm that order.

We now turn to NC WARN's argument that it had standing to intervene after entry of the settlement order. The Commission's investigation in this case was an investigation pursuant to N.C. Gen. Stat. § 62-37, which provides:

(a) The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility. In conducting such investigation the Commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the *parties affected* thereby notice and hearing.

(Emphasis added.)

NC WARN contends that it was a "party affected" by the Commission's settlement order because the settlement order "directly modified the underlying merger order in the merger docket" since it "goes outside the scope of investigation and attempts to . . . resolve matters in the merger dockets." NC WARN was a party to the merger docket, and it contends that it "cannot be a party affected in the merger dockets and somehow no longer affected when the merger order is modified in another docket."

We note that NC WARN never filed a second motion to intervene with the Commission, after entry of the settlement order, presenting the argument it now raises on appeal. However, NC WARN did argue in its first notice of appeal that the settlement order "approved a settlement agreement that had the intent and effect of significantly modifying the Commission's [merger order] in the other dockets relating to the merger of the two electric utilities . . . in which NC WARN was an intervening party." This is essentially the same basis upon which NC WARN now contends that it had standing to intervene in this investigation.

In its order dismissing NC WARN's first appeal, the Commission determined that NC WARN was properly denied intervention and that "the Commission's order in this docket does not modify its order in the merger docket as NC WARN alleges." We assume, without deciding, that

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NC WARN's assertions in its first notice of appeal, and the Commission's ruling in its order dismissing that appeal, sufficiently preserve for appeal NC WARN's standing argument.

This Court addressed a similar standing issue in *CUCA*. There, the Commission and a South Carolina agency initiated a joint investigation of Duke Power under N.C. Gen. Stat. § 62-37 regarding accounting irregularities at Duke alleged by a whistleblower. *CUCA*, 163 N.C. App. at 2, 592 S.E.2d at 278. Carolina Utility Customers Association, Inc. (“CUCA”), an association representing many of North Carolina's largest industrial manufacturers, sought permission to “participate in” the investigation “to insure that the interests of its rate-paying manufacturers who may have suffered disproportionately from any excessive charges for electrical power were protected.” *Id.*

The Commission denied CUCA's request to participate, and during the investigation it was determined that Duke had, through accounting practices, “inappropriately reduced” its “‘pre-tax utility operating income’” for several years by millions of dollars. *Id.* at 3, 592 S.E.2d at 279. The Commission Staff and Duke then negotiated a settlement agreement whereby Duke would be required, among other things, to correct erroneous accounting entries, “make a one-time \$25 million credit in 2002 to its deferred fuel amounts in North Carolina and South Carolina . . . to be incorporated into the next fuel cost proceedings in the respective states[,]” implement certain remedial actions, and “‘acknowledge and regret that communications with the two State Commissions failed to adequately detail significant changes to prior accounting practices[.]’” *Id.* at 4, 592 S.E.2d at 279.

The Commission held a staff conference to discuss the settlement agreement, and CUCA presented the Commission, at the conference, with a “motion requesting further investigation and hearing.” *Id.* at 5, 592 S.E.2d at 279. The Commission denied CUCA's motion and voted unanimously to approve the settlement agreement, but the vote did not constitute a final order since the South Carolina agency had not yet approved the agreement. *Id.*, 592 S.E.2d at 279-80.

Prior to entry of a final order, CUCA and an individual ratepayer, Wells Eddleman, filed petitions to intervene and motions for further investigation and hearing. *Id.* at 2, 5, 592 S.E.2d at 278, 280. The Commission subsequently entered a final order granting CUCA and Eddleman's motions to intervene after concluding that “‘as ratepayers, CUCA [and] Eddleman . . . are affected by the level of Duke's rates and have an interest in this matter.’” *Id.* at 5, 592 S.E.2d at 280. The

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Commission's order, however, denied the motions for further hearing and formally approved the settlement agreement. *Id.* On appeal, CUCA and Eddleman "raise[d] issues regarding the investigation of Duke and the Commission's subsequent order approving the settlement agreement resulting from that investigation." *Id.* at 6, 592 S.E.2d at 280. Duke, in turn, cross-appealed and argued that the Commission erred in granting CUCA and Eddleman intervention since they were not "'parties affected'" by the investigation. *Id.*

This Court in *CUCA* held that CUCA and Eddleman were not "'parties affected'" by the order and, therefore, had no standing to appeal the Commission's approval of the settlement agreement. *Id.* The Court first noted that "the investigation of Duke was conducted by the Commission pursuant to its powers and duties defined under Article 3 of our General Statutes, particularly Section 62-37, and not pursuant to the Commission's judicial functions outlined in Article 4." *Id.* The Court observed that intervention under the Commission Procedural Rules was permitted as follows: "'Any person having an interest in the subject matter of any hearing or investigation pending before the Commission may become a party thereto and have the right to call and examine witnesses, cross-examine opposing witnesses, and be heard on all matters relative to the issues involved . . .'" *Id.* at 7-8, 592 S.E.2d at 281 (quoting N.C.U.C. Rule R1-19(a)). The Commission had, therefore, "concluded that CUCA and Eddleman not only had an 'interest in the subject matter' but were also 'parties affected' by the order . . ." *Id.* at 8, 592 S.E.2d at 281.

With respect to whether CUCA and Eddleman were "parties" to the investigation, the Court held that CUCA and Eddleman were not "parties" under N.C. Gen. Stat. § 62-37 until the Commission's final order granted their motion to intervene. 163 N.C. App. at 9, 592 S.E.2d at 282. The Court then addressed whether CUCA and Eddleman were parties "affected" by the order, and looked to a case interpreting the prior version of the statute providing a right to appeal the Commission's orders for "'any party affected thereby.'" *Id.* (quoting *In re Hous. Auth. of City of Charlotte*, 233 N.C. 649, 657, 65 S.E.2d 761, 767 (1951)). The Court observed that "'party affected'" had been defined, under that statute, as follows: "'[A] party is not affected by a ruling of the Utilities Commission unless the decision affects or purports to affect some right or interest of a party to the controversy and [is] in some way determinative of some material question involved.'" *Id.* (quoting *In re Hous. Auth.*, 233 N.C. at 657, 65 S.E.2d at 767).

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Further, with respect to whether a party is “affected,” the Court explained that the current appeals statute, which replaced the statute construed in *In re Housing Authority*, used the phrase “‘party aggrieved’” instead of “‘party affected.’” 163 N.C. App. at 10, 592 S.E.2d at 282 (quoting N.C. Gen. Stat. § 62-90(a) (2003)). The Court observed that, generally, “[a] ‘party aggrieved’ is one whose rights have been directly and injuriously affected by the judgment entered” *Id.* (quoting *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 496, 516 S.E.2d 176, 184 (1999)). In addition, “[t]his Court’s interpretation of ‘party aggrieved’ as it relates to an appeal of an order by the Commission also suggests that more than a generalized interest in the subject matter is required.” *Id.*

Applying those interpretations of “‘party affected’” and “‘party aggrieved’” to the facts before it, the Court in *CUCA* reasoned:

Duke was the only party recognized by the Commission throughout the investigation, as well as the only party directly and substantially affected by any subsequent order arising therefrom in the sense envisioned by the statute. As such, only Duke was entitled to receive notice and hearing pursuant to Section 62-37 to protect its due process rights. *While CUCA and Eddleman may have had an interest in the matter, their interest was only generalized and unsubstantial — not specific to them as individual Duke customers.*

Id., 592 S.E.2d at 283 (emphasis added).

The Court also rejected *CUCA* and Eddleman’s argument that there was no party in the investigation that adequately protected their interests. *Id.* at 11, 592 S.E.2d at 283. In fact, the Court pointed out, the Public Staff participated in the investigation and recommended approving the settlement agreement, and the Public Staff acts independently of the Commission and was created “‘to represent [the interests of] the using and consuming public’ in matters before the Commission.” *Id.* (quoting N.C. Gen. Stat. § 62-15(b) (2003)).

The Court in *CUCA* concluded that while *CUCA* and Eddleman “may have had an interest in the matter sufficient for intervention in a hearing or investigation pending before the Commission pursuant to Article 4, Article 3 requires the prospective interveners to also be ‘parties affected’ pursuant to Section 62-37.” *Id.* at 11-12, 592 S.E.2d at 283-84. Since “approval of the settlement agreement only had a generalized and unsubstantial affect on *CUCA* and Eddleman, they were not ‘parties

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affected[.]’” and the Commission abused its discretion in granting their petitions to intervene. *Id.* at 12, 592 S.E.2d at 284. Further, since CUCA and Eddleman had no standing to appeal from the Commission’s final order, the Court affirmed the order. *Id.* at 6, 12, 592 S.E.2d at 280, 284.

Here, Duke was the only party investigated by the Commission and, as in *CUCA*, the investigation was pursuant to the Commission’s Article 3 powers and not its Article 4 judicial power. Like *CUCA*, NC WARN is an organization of ratepayer members and sought to intervene in order to protect the financial interests of its members. In other words, NC WARN’s interest was “only generalized and unsubstantial — not specific to [it] as [an] individual Duke customer[.]” *Id.* at 10, 592 S.E.2d at 283. And, as in *CUCA*, the Public Staff, the party protecting the interest of the consuming public, participated in the investigation and recommended the Commission adopt the settlement agreement. NC WARN’s interest in this case is, therefore, materially indistinguishable from the interests of the intervenors in *CUCA*.

NC WARN nonetheless tries to distinguish *CUCA* from the present case by arguing that here, unlike in *CUCA*, the settlement order modified the merger order and NC WARN, having already been a party to the merger docket, was therefore necessarily a party affected by the settlement order. In support of its argument, NC WARN relies upon the following specific provisions of the settlement agreement:

- C. Duke will guarantee that Duke’s North Carolina retail ratepayers will receive an additional \$25 million in fuel and fuel-related cost savings over and above the amount Duke is obligated to provide pursuant to the Merger Order.
- D. Duke will contribute an additional \$5 million to workforce development and low-income assistance in North Carolina on top of the amount provided in the Merger Order.

NC WARN also points to the settlement agreement’s statement that the parties “desire to resolve all matters and issues involved in the Commission’s investigation and the Merger Dockets without further litigation and expense and to move forward in a positive manner.” These provisions of the settlement agreement were summarized in the Commission’s settlement order.

Based on the provisions highlighted by NC WARN, however, we believe that the settlement agreement does not modify the merger order

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but, by its own terms, requires Duke to comply with provisions that are “over and above” obligations placed on Duke in the merger order. While we acknowledge that the parties’ assertion in the settlement agreement that they wanted to resolve “all matters and issues involved in the . . . Merger Dockets” unnecessarily blurred the otherwise clear distinction between the two proceedings, the parties’ loose statement does not serve to alter the material terms of the settlement agreement highlighted by NC WARN. Based on the face of the agreement as to those terms, we cannot conclude that the settlement order modified the merger order.

Further, even assuming that the settlement order dealt with some of the same matters at issue in the merger order, *CUCA* makes clear that there are different requirements for intervention in an Article 4 judicial proceeding before the Commission and intervention in an Article 3 investigation before the Commission. While it appears that the Commission’s Procedural Rules permit intervention by “[a]ny person having an interest in the subject matter of any hearing” before the Commission, *id.* at 7, 592 S.E.2d at 281 (quoting N.C.U.C. Rule R1-19(a)), the “party affected” standard under N.C. Gen. Stat. § 62-37(a) is higher and does not permit intervention by a party that merely has a “generalized and unsubstantial” interest in the matter, *CUCA*, 163 N.C. App. at 10, 592 S.E.2d at 283. Thus, under *CUCA*, even assuming NC WARN had an interest sufficient to intervene in the merger docket, a non-Article 3 proceeding, NC WARN’s intervention in the merger docket does not show that it was a party affected for purposes of the investigation docket.

Under *CUCA*, we hold that NC WARN was properly denied intervention by the Commission and that the subsequent entry of the settlement order did not change NC WARN’s status and make NC WARN a “party affected.” Consequently, as in *CUCA*, NC WARN has no standing to appeal from the settlement order, and we affirm that order as well. In light of our disposition, we deny Duke’s motion to dismiss the appeal.

Vacated in part; affirmed in part.

Judges BRYANT and CALABRIA concur.

IN RE MOORE

[234 N.C. App. 37 (2014)]

IN THE MATTER OF GILBERT MOORE, JR.

No. COA13-1397

Filed 20 May 2014

1. Appeal and Error—notice of appeal—designation of court omitted—writ of certiorari

The Court of Appeals granted a petition for a writ of certiorari in an involuntary commitment case where the notice of appeal did not designate the court to which the appeal was taken.

2. Appeal and Error—mootness—expiration of involuntary commitment order

An appeal from a ninety-day involuntary commitment order was not moot even though the ninety days had passed because there could be collateral legal consequences.

3. Appeal and Error—preservation of issues—waiver—involuntary recommitment—objection not raised at first hearing

The respondent in a case involving a ninety-day recommitment order waived his argument concerning subject matter jurisdiction and the facts alleged in the petition where his argument challenged the magistrate's determination to issue a custody order on those facts. Furthermore, respondent should have raised his concerns about the affidavit's sufficiency during his first involuntary commitment hearing.

4. Mental Illness—findings—evidentiary—recital of doctor's testimony

In an involuntary commitment proceeding, the trial court did not err by making a challenged evidentiary finding of fact even though it was reciting some of a doctor's testimony because the trial court went on to find the ultimate facts that defendant was mentally ill and a danger to himself and others.

5. Mental Illness—involuntary commitment—findings—defendant a threat to himself

The trial court in an involuntary commitment proceeding properly found that respondent was a danger to himself because of a reasonable possibility that defendant would suffer serious physical debilitation in the near future. While the trial court made findings about defendant's past conduct, the trial court also made finding about respondent's likely future conduct.

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Appeal by respondent from order entered 5 August 2013 by Judge Amanda E. Stevenson in Granville County District Court. Heard in the Court of Appeals 5 May 2014.

Roy Cooper, Attorney General, by Adam Shestak, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for respondent-appellant.

MARTIN, Chief Judge.

Respondent Gilbert Moore, Jr. appeals from the trial court's involuntary commitment order 5 August 2013 recommitting him for ninety days of inpatient treatment. Respondent argues that the trial court lacked subject-matter jurisdiction and that the evidence does not support the trial court's ultimate findings that respondent was a danger to himself as well as others.

On 25 September 2012, a licensed clinical social worker in Guilford County filed an affidavit and petition to have respondent involuntarily committed. The affidavit contained the following facts:

Mr. Moore has a history of mental illness. At present he has very disorganized speech and is not making any sense. He has reported to the crisis center multiple times this morning. He is not able to express exactly what he needs due to his mental illness. He appears to have a thought disorder or some kind of psychotic disorder. He is in need of evaluation and treatment.

The same day, a Guilford County magistrate, based on petitioner's affidavit and petition, issued a custody order and respondent was picked up by a law enforcement officer and taken to a facility for examination. Respondent was then examined by two different physicians, both of whom recommended inpatient commitment for respondent, and respondent was taken to Central Regional Hospital. After a hearing on 2 October 2012, the District Court of Granville County issued an involuntary commitment order committing respondent to thirty days of inpatient commitment and sixty days of outpatient commitment. The court recommitted respondent to ninety days of inpatient treatment on 1 November 2012. Additional involuntary commitment orders for varying durations were issued by the district court on 31 January 2013, 4 April 2013, 13 June 2013, and 5 August 2013.

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Before issuing its 5 August 2013 order, the court heard evidence as follows: Dr. Jeffrey Fahs, respondent's attending physician, testified that respondent had schizoaffective disorder. He further testified that by age forty-four respondent had been committed to state hospitals approximately twenty-seven times, and one of the reasons he was re-hospitalized so many times was because he would stop taking his medication when he was released. Dr. Fahs also thought that respondent was a danger to others; respondent was on Central Regional Hospital's alert system due to at least one altercation with another patient. Dr. Fahs, based on respondent's condition, history of violence, and the fact that no suitable discharge placement was available, recommended that respondent be recommitted for ninety days.

Esther Robie, a social worker who worked with respondent, also testified that respondent needed a proper discharge placement because his discharges have become shorter and his readmissions more frequent because he stops taking his medication during periods of discharge. In fact, in the year before respondent's 2 October 2012 involuntary commitment, he had been admitted to hospitals on three different occasions. Ms. Robie also testified that when respondent first arrived at Central Regional Hospital he was placed in the high management unit because of his aggressive behavior.

Based on Dr. Fahs's and Ms. Robie's testimony the district court made the following findings of fact:

1. The respondent was admitted to this facility on 09-29-2012.
2. The respondent has a diagnosis of schizoaffective disorder with psychotic and manic symptoms. In the past, he also had delusional thinking.
3. Upon admission on September 29, 2012, he had exhibited aggressive tendencies.
4. The respondent has a history of 27 state psychiatric hospitalizations and many other non-state psychiatric hospitalizations.
5. He has a history of non-compliance with his medications outside of the hospital.
6. The respondent is at high risk of decompensation if released and without medication.

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7. During his relapses, he is a danger to others.
8. Since October 2012, he has been compliant with medications. He is doing well with treatment, listens to team and is on level 5. This entitles him to off campus privileges.
9. Dr. Fahs stated he is concerned he would “relapse by the end of football season” if released without placement.
10. His readmissions are more frequent.
11. The respondent acknowledges his mental illness.

Based on these findings of fact, the trial court found that there was clear, cogent, and convincing evidence to support a finding that respondent is mentally ill and is a danger to himself and others, and ordered the recommitment of respondent as an inpatient for ninety days. Respondent appeals.

Before addressing the merits of respondent’s appeal we must address two preliminary matters: (1) whether to grant respondent’s petition for writ of certiorari, and (2) whether respondent’s appeal is moot.

[1] First, respondent has filed a petition for writ of certiorari because his notice of appeal failed to designate “the court to which [his] appeal is taken” as required by North Carolina Rule of Appellate Procedure 3(d). A party must comply with the requirements of Rule 3 to confer jurisdiction on an appellate court. *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Thus, failure to comply with Rule 3 is a jurisdictional default that prevents this Court “from acting in any manner other than to dismiss the appeal.” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). North Carolina Rule of Appellate Procedure 21(a)(1), however, allows us to issue a writ of certiorari under “appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.” In *State v. Hammons*, __ N.C. App. __, __, 720 S.E.2d 820, 823 (2012), we exercised our discretion to allow the defendant’s petition for writ of certiorari when “it [was] readily apparent that [the] defendant ha[d] lost his appeal through no fault of his own, but rather as a result of sloppy drafting of counsel.” Therefore, we exercise our discretion and grant respondent’s petition for writ of certiorari and address the merits of his appeal.

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[2] Next, we hold that respondent’s appeal is not moot even though the ninety-day commitment period provided in the 5 August 2013 order, from which respondent appeals, has expired. Our Supreme Court has addressed the question of whether the discharge of a person who was involuntarily committed renders an appeal moot. *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 634 (1977). The Court in *Hatley* reasoned that “[t]he possibility that respondent’s commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequences, convinces us that this appeal is not moot.” *Id.* at 695, 231 S.E.2d at 635. Respondent’s appeal is not moot.

[3] Respondent’s first substantive argument is that the trial court lacked subject-matter jurisdiction to recommit him on 5 August 2013 because the 25 September 2012 affidavit and petition were fatally deficient because the facts alleged did not demonstrate that respondent met the statutory requirements for involuntary commitment. This argument fails for the reasons stated below.

While respondent claims he is challenging the subject-matter jurisdiction of the trial court to commit him, his argument appears to be that the facts in the original affidavit and petition were insufficient to demonstrate that reasonable grounds existed to believe that respondent was mentally ill and a danger to himself or others. *See* N.C. Gen. Stat. § 122C-261(a)–(b) (2013) (requiring the petitioner to state the facts that his opinion that the respondent is mentally ill and a danger to himself or others is based on, and requiring the magistrate to determine if there are reasonable grounds to believe that the respondent is mentally ill and a danger to himself or others). Thus, respondent challenges the magistrate’s 25 September 2012 determination to issue a custody order. For the reasons stated below, we hold that respondent has waived this argument.

We have previously found that N.C.G.S. § 122C-261’s reasonable grounds requirement is synonymous with probable cause in the criminal context. *See, e.g., In re Reed*, 39 N.C. App. 227, 229, 249 S.E.2d 864, 866 (1978) (“Reasonable grounds has been found to be synonymous with probable cause,” (internal quotation marks omitted)). We have drawn this comparison because a custody order deprives a person of their liberty and therefore is analogous to a criminal proceeding, like the issuance of an arrest warrant, where a defendant is deprived of his liberty. *In re Zollicoffer*, 165 N.C. App. 462, 466, 598 S.E.2d 696, 699 (2004). In the past, we have left the analogy there, however, today we take the analogy one step further.

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When there is a problem with a warrant, a defendant may waive his objection to the sufficiency of the warrant if he does not object before he enters a plea of not guilty. *State v. Green*, 251 N.C. 40, 43, 110 S.E.2d 609, 611–12 (1959); see also Irving Joyner, *Criminal Procedure in North Carolina* § 2.4[C] (3rd ed. 2005). Based on the procedure for challenging a warrant in the criminal context, respondent should have raised his concerns about the affidavit’s sufficiency during his first involuntary commitment hearing. Furthermore, while none of our involuntary commitment case law has directly addressed respondent’s argument, a requirement that respondents raise issues with the affidavit, petition, or custody order in the first involuntary commitment hearing is consistent with our case law. *Reed*, 39 N.C. App. at 228, 249 S.E.2d at 865, addressed a respondent’s argument that an affidavit was defective. The Court recited the facts of the case as follows:

On the affidavit of his cousin, respondent was taken into custody. At his commitment hearing, he moved to dismiss on the ground that the petition for commitment was so vague as to violate both the statutory standard and due process, so that there could have been no finding of probable cause for issuance of the custody order.

Id. at 277, 249 S.E.2d at 865. Thus, the facts suggest that the respondent in *Reed* challenged the sufficiency of the affidavit during his first involuntary commitment hearing, rather than at a later recommitment hearing. Here, respondent failed to raise the issue of the sufficiency of the affidavit during the first involuntary commitment hearing, nor did the record reflect that he raised it at any of the four recommitment hearings preceding the present appeal. Thus, we hold respondent has waived any challenge to the sufficiency of the affidavit to support the magistrate’s original custody order.

[4] Next, respondent challenges two findings of fact from the 5 August 2013 order: (1) Finding of Fact 9, and (2) the ultimate findings that respondent was a danger to himself as well as others.

Our standard of review for a recommitment order is the same as our standard of review for a commitment order. *In re Hayes*, 151 N.C. App. 27, 29, 564 S.E.2d 305, 307 (“We see no reason to distinguish the standard of review of a recommitment order from that of a commitment order.”), *disc. review denied and appeal dismissed*, 356 N.C. 613, 574 S.E.2d 680 (2002). When we review a commitment order, our review is limited to determining “(1) whether the court’s ultimate findings are indeed supported by the ‘facts’ which the court recorded in its order as supporting

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its findings, and (2) whether in any event there was competent evidence to support the court's findings." *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977). If a respondent does not challenge a finding of fact, however, it is "presumed to be supported by competent evidence and [is] binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984). Furthermore, we do not reweigh the evidence because "[i]t is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing." *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 781 (1978).

Respondent challenges Finding of Fact 9, which states: "Dr. Fahs stated he is concerned [respondent] would 'relapse by the end of football season' if released without placement." Respondent argues that this is not a finding of fact because it is simply a recitation of evidence. For this proposition respondent relies on *In re Rogers*, 297 N.C. 48, 55, 253 S.E.2d 912, 917 (1979), which states: "Indeed [the Board] made no findings of fact at all. It merely recited some of the evidence presented and stated its conclusion that Rogers had not satisfied the Board of his good moral character." While on its face this statement would seem to support respondent's argument, it does not.

There are two types of facts: Ultimate facts and evidentiary facts. See *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951). "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Id.* Thus, knowing that there are evidentiary facts and ultimate facts, it is clear that the issue in *Rogers* was that the Board only found evidentiary facts and not ultimate facts, which would support its conclusion of law. Applied here, the trial court did not err in making the evidentiary finding in Finding of Fact 9 even though it was reciting some of Dr. Fahs's testimony because the trial court went on to find the ultimate facts that respondent was mentally ill and a danger to himself and others.

[5] Next, respondent asserts that there is not clear, cogent, and convincing evidence to support the trial court's ultimate findings that respondent is a danger to himself and a danger to others.¹

1. We note that respondent states he is challenging the trial court's conclusions of law that respondent is a danger to himself and others. While the pre-printed Involuntary Commitment Order AOC-SP-203 categorizes these as "conclusions," the law is clear that these determinations are not conclusions of law because "[w]hether a person is mentally ill . . . and whether he is imminently dangerous to himself or others, present questions of fact." *Hogan*, 32 N.C. App. at 433, 232 S.E.2d at 494. Thus, "[w]e will ignore the incorrect designation and treat the court's conclusions as findings of the ultimate facts required by [the statute]." See *id.*

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A person is a danger to himself if within the relevant past:

1. The individual has acted in such a way as to show:
 - I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
 - II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself

N.C. Gen. Stat. § 122C-3(11)(a) (2013). Respondent concedes that the evidence supports subpart I of the definition, but argues that the evidence does not support the finding that there was a “reasonable probability” that respondent would suffer serious physical debilitation in the near future. Respondent relies on *In re Whatley*, __ N.C. App. __, __, 736 S.E.2d 527, 531 (2012), *appeal after remand*, __ N.C. App. __, 754 S.E.2d 258 (2014) (unpublished), for the proposition that the possibility of relapse alone cannot satisfy the requirement of serious physical debilitation in the near future. The *Whatley* court was concerned that the trial court’s findings of fact were all focused on the respondent’s past conduct and not about the respondent’s potential future conduct. *Id.* (“Each of the trial court’s findings pertain to either Respondent’s history of mental illness or her behavior prior to and leading up to the commitment hearing, but they do not indicate that these circumstances render Respondent a danger to herself in the future.”). The facts before us are distinguishable from *Whatley* because, while the trial court did make findings of fact about respondent’s past conduct, the trial court also made findings about respondent’s likely future conduct. The trial court found that respondent “is at a high risk of decompensation if released and without medication,” and that Dr. Fahs thought respondent, if released, would “relapse by the end of football season.” As a result, the trial court’s findings of fact indicate that respondent is a danger to himself in the future. Therefore, the trial court properly found that

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respondent is a danger to himself because there is a reasonable possibility that he will suffer serious physical debilitation in the near future.

We do not need to consider respondent's argument that he is not a danger to others because N.C.G.S. § 122C-276(e) in conjunction with N.C.G.S. § 122C-271(b)(2) only requires that the trial court find that a respondent is a danger to himself or others.

For the reasons stated above, we affirm.

Affirmed.

Judges STEELMAN and DILLON concur.

ALEX D. McLENNAN, JR., DOROTHY N. McLENNAN,
AND RUFUS T. CARR, JR., PLAINTIFFS

v.

C.K. JOSEY, JR., DEBORAH G. JOSEY, JOSEY PROPERTIES, LLC,
THOMAS D. TEMPLE, IV, CRYSTAL TEMPLE, BETTY JO TEMPLE,
AND JOSEPH LANIER RIDDICK, III, DEFENDANTS

No. COA13-1271

Filed 20 May 2014

Real Property—dispute—boundary line—summary judgment

The trial court did not err in a real property dispute case by granting plaintiffs' motion for summary judgment. Plaintiffs established a prima facie case of title to the disputed land, and defendants presented no evidence by way of deeds in their chain of title to establish their superior claim to the disputed land. No genuine issue of material fact existed as to the true location of the boundary line as contemplated by the partition.

Appeal by defendants from order entered 10 June 2013 by Judge J. Carlton Cole in Halifax County Superior Court. Heard in the Court of Appeals 19 March 2014.

Rountree & Boyette L.L.P., by Charles S. Rountree, for plaintiffs-appellees.

Etheridge, Hamlett & Murray, L.L.P., by Ernie K. Murray, for defendants-appellants.

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ELMORE, Judge.

Defendants appeal from order granting plaintiffs' motion for summary judgment. After careful consideration, we affirm.

I. Facts

Alex McLennan, Jr., Dorothy McLennan, and Rufus Carr, Jr., (collectively plaintiffs) and C.K. Josey, Jr., Deborah G. Josey, Josey Properties, LLC., Thomas D. Temple, IV, Crystal Temple, Betty Jo Temple, and Joseph Lanier Riddick, III, (collectively defendants) own adjoining tracts of land with a common boundary located in Halifax County. In July 2010, defendants recorded a map at Book 2009, Page 193, and a deed at Book 2321, Page 750, in the Halifax County Registry that asserted ownership of an area allegedly owned by plaintiffs. On 27 August 2010, plaintiffs filed a "COMPLAINT TO ESTABLISH BOUNDARY AND QUIET TITLE" pursuant to N.C. Gen. Stat. § 41-10. Plaintiffs alleged that defendants "claimed ownership of lands owned by Plaintiffs and have created a cloud on title to Plaintiff's [sic] property." Thereafter, plaintiffs filed a motion for summary judgment that was heard before Judge J. Carlton Cole on 25 and 26 February 2013. At the hearing, the evidence showed that both parties obtained title to their tracts from a common source, David Clark, on 10 November 1882. Following Clark's death, his lands were partitioned and divided among his heirs in the "Report of Commissioners in Partition" (the partition). Plaintiffs' source of title is "Lot 4," allocated to Anna Clark, and defendants' source of title is "Lot 8," allotted to Dora Clark. Plaintiffs' southern boundary line and defendants' northern boundary line are shared in common. The partition describes the common boundary line as "down the run of [Gaynor's] Gut to the Canal[.]" The dispute arises from the parties' disagreement as to the location on the ground of the run of the gut to the canal. Both parties agree that the shared boundary runs southwest to a point where the flow of the gut diverges. However, plaintiffs argue that the gut forks left at that divergent point and runs through a dam, a pond, and then empties into the canal. Defendants contend that the gut forks right at the split and then empties into the canal.

II. Analysis**a.) Prima Facie Case**

Defendants argue that the trial court erred in granting plaintiffs' motion for summary judgment. Specifically, defendants aver that plaintiffs failed to meet their burden of establishing the on-the-ground

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location of the claimed boundary line: the run of the gut to the canal. We disagree.

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). We must consider “the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party[.]” *Pine Knoll Ass’n, Inc. v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997).

Pursuant to N.C. Gen. Stat. § 41-10, an individual can institute an action to remove a cloud on title “against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]” N.C. Gen. Stat. § 41-10 (2013). The statute provides this express authority in an attempt to “free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion[.]” *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997) (citation and quotation omitted). Should the plaintiff establish “a *prima facie* case for removing a cloud on title, the burden rests upon the defendant to establish that his title to the property defeats the plaintiff’s claim.” *Id.* (citation omitted). The plaintiff establishes a *prima facie* case for removing a cloud on title upon satisfying two prongs: “(1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to plaintiff’s title, estate or interest.” *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004) (citation omitted). In order to establish ownership of the disputed land under prong one, the plaintiff can utilize the “common source of title” doctrine, which requires him “to connect both [himself] and defendants with a common source of title and then show in [himself] a better title from that source.” *Chappell v. Donnelly*, 113 N.C. App. 626, 629-30, 439 S.E.2d 802, 805 (1994) (citation omitted). Additionally, the plaintiff must show that “the disputed tract lies within the boundaries of their property.” *Id.* (citations omitted). Accordingly, the burden is on the plaintiff to establish “the on-the-ground location of the boundary lines which they claim.” *Id.* (citation omitted). He must “locate the land by fitting the description in the deeds to the earth’s surface.” *Id.* (citation and quotation omitted). In locating such land:

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courts endeavor to place themselves in the position of the parties at the time of the conveyance, in order to ascertain what is intended to be conveyed; for, in describing the property, parties are presumed to refer to its condition at that time, and the meaning of their terms of expression can only be properly understood by a knowledge of their position, and that of the property conveyed.

Cox v. McGowan, 116 N.C. 74, 76, 21 S.E. 108, 109 (1895) (citation omitted). It necessarily follows that “[r]esort may not be had to a junior conveyance for the purpose of locating a call in a senior deed.” *Bostic v. Blanton*, 232 N.C. 441, 445, 61 S.E.2d 443, 446 (1950) (citations omitted).

In *Poe v. Bryan*, the plaintiff testified that she had personal knowledge of the contended boundary line because she lived on the tract of land during her youth and learned about the boundary lines from her grandfather. 12 N.C. App. 462, 466, 183 S.E. 2d 790, 792-93 (1971). A surveyor also testified that “the courses on the court map were normal variations from the courses on the deed and that the land described in the deed is the same tract of land shown as plaintiffs’ contended tract.” *Id.* at 466-67, 183 S.E.2d at 793. We held that “the testimony of the feme plaintiff and the [trial] court appointed surveyor constitutes sufficient evidence that the description of the . . . deed fits the land and embraces the land in controversy.” *Id.* at 467, 183 S.E.2d at 793. Conversely, our Supreme Court in *Day v. Godwin* held that the plaintiff failed to meet his burden to locate the on-the-ground location of the disputed land because no survey of the disputed land was conducted nor did plaintiff have personal knowledge about the location of the disputed tract. 258 N.C. 465, 470-71, 128 S.E.2d 814, 817-18 (1963).

In the case at bar, plaintiff McClennan testified that he worked on his grandfather’s farm and Lot 4 since 1958. During that time, he “came to know the location of Gaynor’s Gut from the Dam at Blue Pond to the Dam at Coon Pond, and from the Dam at Coon Pond through Coon Pond to where Gaynor’s Gut enters Clark’s Canal.” In 1967, he managed the farm on a full-time basis, and it required that he “know the location of Gaynor’s Gut and the other boundaries of the property being managed.” Plaintiff McClennan testified that the disputed boundary line encompassing plaintiffs’ land “has been a well known, well marked and agreed upon line between our lands since the division of the David Clark lands in the 1800’s.” Additionally, a professional surveyor, Donald S. Hilhorst, surveyed Gaynor’s Gut in 2010 using various recorded documents in the Halifax County Register of Deeds Office. He found the boundary line to comport with plaintiff McClennan’s testimony. Hilhorst’s survey was

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also consistent with “the legal description of Gaynor’s Gut” found in a 1909 deed and “the recorded survey of the Mrs. Anna C. Arnold [map].”

The 1909 deed divided defendants’ predecessors’ Lot 8 into two parcels and gave one 805-acre parcel to the Wilts Veneer Company with the remaining tract to be held by defendants’ predecessors. The deed explicitly indicated a shared boundary line between Wilts Veneer Company and Anna Arnold’s (plaintiffs’ predecessor in title) Lot 4, which necessarily included the disputed land as part of Lot 4. It also contained a course and distance description of the run of Gaynor’s Gut that places the disputed tract within Lot 4.

The Anna Arnold map was created in 1918 to reflect a portion of Lot 4 that was given by Anna Arnold to Wilts Veneer Company in a timber rights conveyance. It included a metes and bounds description of Gaynor’s Gut from Lot 4’s northeast corner down to its run to the Canal. The metes and bounds description reflected on the map shows the disputed land to have been owned by Anna Arnold.

Although Hilhorst used junior conveyances by referencing the 1909 and 1918 documents in his survey, they did not enlarge the plaintiffs’ boundary lines, but rather provided an unambiguous specific description of Gaynor’s Gut, which comports with the general description found in the partition. *See Carney v. Edwards*, 256 N.C. 20, 24, 122 S.E.2d 786, 788-89 (1961) (“It is . . . well settled that a general description will not enlarge a specific description when the latter is in fact sufficient to identify the land which it purports to convey. Only when the attempted specific description is ambiguous and uncertain will the general prevail.” (citation omitted)). In totality, plaintiffs’ evidence was sufficient to meet their burden to show that the disputed area lies within the boundaries of their land.

b.) Defendants’ Burden

Since plaintiffs established a *prima facie* case of title to the disputed land, defendants were required to establish that their title was superior.

On appeal, however, defendants present no evidence by way of deeds in their chain of title to establish their superior claim to the disputed land. Moreover, defendants’ recorded map in 2010 and subsequent deeds using the map’s boundary description to convey the disputed land are junior to the 1909 and 1918 documents that describe the run of Gaynor’s Gut. Thus, the descriptions found in the 1909 and 1918 documents control. *See Goodwin v. Greene*, 237 N.C. 244, 250, 74 S.E.2d 630, 634 (1953) (“Where a junior deed calls for a corner or line in a prior

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deed . . . it is not permissible to resort to a call in the junior deed for the purpose of establishing the call or line in the prior deed.”). The 1909 deed is included by reference in each deed within defendants’ chain of title. Their chain of title specifically excludes defendants and their predecessors from the tract that was given to the Wilts Veneer Company in the 1909 deed. As previously mentioned, the 1909 deed establishes that the disputed land was never a part of defendants’ Lot 8.

Although defendants offer parol evidence in the form of a 2010 elevation study, affidavits of individuals with personal knowledge of the boundary line, and other extrinsic testimony to show that the disputed land belongs to them, reliance on such evidence is improper. See *Overton v. Boyce*, 289 N.C. 291, 293-94, 221 S.E.2d 347, 349 (1976) (“When the deed itself, including its references . . . describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land” but is inadmissible to “enlarge the scope of the description in the deed.” (citations omitted)). Thus, defendants failed to establish that their title to the disputed property was superior to plaintiffs’ title. Accordingly, the trial court properly granted summary judgment to plaintiffs.

III. Conclusion

In sum, we affirm the trial court’s order granting plaintiffs’ motion for summary judgment because no genuine issue of material fact exists as to the true location of the boundary line as contemplated by the partition.

Affirmed.

Judges McCULLOUGH and DAVIS concur.

NANNY'S KORNER CARE CTR. v. N.C. DEPT OF HEALTH & HUM. SERVS.

[234 N.C. App. 51 (2014)]

NANNY'S KORNER CARE CENTER BY BERNICE M. CROMARTIE, CEO, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES — DIVISION
OF CHILD DEVELOPMENT, RESPONDENT

No. COA13-602

Filed 20 May 2014

**Administrative Law—final agency action—child care center—
affirmative duty to substantiate allegation**

In an action arising from a Department of Health and Human Services (DHHS) warning to a child care center arising from alleged abuse, DHHS had an affirmative duty to independently substantiate the abuse before issuing the warning and mandating corrective action. N.C.G.S. § 110-105.2 plainly gives that affirmative duty to DHHS, thereby preventing it from treating a local Department of Social Services substantiation as dispositive. Furthermore, although a constitutional challenge was not advanced on appeal, the petitioner here arguably suffered a deprivation of liberty interests guaranteed by the State constitution.

Appeal by petitioner from order entered 9 January 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 10 October 2013.

George Ligon, Jr., for petitioner–appellant.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra Gruber, for the State.

HUNTER, JR., Robert N., Judge.

Petitioner Nanny's Korner Care Center by Bernice M. Cromartie, CEO ("Petitioner") appeals from an order affirming the Final Agency Decision of Respondent North Carolina Department of Health and Human Services ("DHHS") in which DHHS issued a written warning to Petitioner's child care center and prohibited Petitioner's husband from being on the child care center's premises while children are on site. Petitioner contends that the superior court erred in concluding that DHHS could rely on a substantiation of abuse made by a local Department of Social Services to invoke its disciplinary authority under N.C. Gen. Stat. § 110-105.2(b). We agree.

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[234 N.C. App. 51 (2014)]

I. Factual & Procedural History

Bernice Cromartie (“Mrs. Cromartie”) is the CEO and President of Nanny’s Korner Care Center (“Nanny’s Korner”), a child care facility located in Lumberton, operating pursuant to a license issued by the Division of Child Development and Early Education (“the Division”) within DHHS. Ricky Cromartie (“Mr. Cromartie”), Mrs. Cromartie’s husband, was a lead teacher at Petitioner’s facility and was also responsible for performing janitorial and maintenance work at the facility.

On 5 November 2009, the Division received a report that an eight-year-old girl who was enrolled with Petitioner had complained that a staff member at Nanny’s Korner had touched her inappropriately. On that same day, Sharon Miller (“Ms. Miller”), an abuse and neglect consultant with the Division, along with a social worker from the Robeson County Department of Social Services (“DSS”) began to investigate the allegations in the report. Ms. Miller and the DSS social worker visited the complainant’s school and spoke with the minor child’s guidance counselor and teacher. They then visited the minor child’s home and interviewed the complainant, her three-year-old sibling, and the complainant’s mother.

Ms. Miller and the DSS social worker next visited Nanny’s Korner and interviewed Mr. and Mrs. Cromartie, as well as several staff members. Ms. Miller learned that, on occasion, Mr. Cromartie had been “the sole caregiver for the children after [another staff member’s] shift ended at eight-thirty p.m.” Mrs. Cromartie was adamant that the allegations against her husband were false and upset that her husband was being accused of such conduct. Mr. Cromartie denied inappropriately touching the complainant.

According to Ms. Miller, in order to ensure the safety of affected children during the pendency of an investigation into allegations of child abuse or neglect, the Division typically enters into a “protection plan” with the provider or owner of the facility under investigation. Such a protection plan identifies rules to which the provider or owner agrees to adhere during the course of the investigation. In the present case, on 6 November 2009, Mrs. Cromartie was informed of, and agreed to, a protection plan which provided, in relevant part, that “Mr. Ricky Cromartie can not [sic] and will not be on the premises of the child care center during normal business hours . . . and therefore . . . will not be present while children are present.” Ms. Miller made subsequent visits to Nanny’s Korner in December 2009 and again in January 2010 in order to monitor Petitioner’s compliance with the protection plan.

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On 2 February 2010, Ms. Miller received notice that the local DSS had concluded its investigation and had substantiated the allegations of sexual abuse against Mr. Cromartie. Two days later, on 4 February 2010, Ms. Miller submitted a Case Decision Summary to her supervisor containing the results of the Division's investigation into the allegations of sexual abuse made against Mr. Cromartie. In this Case Decision Summary, Ms. Miller noted that DSS had substantiated that Ricky Cromartie inappropriately touched a child being cared for at Nanny's Korner and recommended issuance of a special provisional license to Nanny's Korner. The Case Decision Summary also indicated that, in making its determination, the Division considered the following "other factors": "The male staff member submitted to a polygraph test and passed with no deception. No criminal charges were filed. No indication that any other staff were involved/aware of the incidents. Protection plan implemented during the initial visit."

Since changing the status of Petitioner's license to a special provisional license "would have resulted in changing the star [rating of the facility]," the Division's Internal Review Panel met in March 2010 to discuss the issuance of a proposed special provisional license and to give Petitioner an opportunity to explain in writing why she believed the Division should not take such action. After meeting for a second time in June 2010 and considering Petitioner's compliance with the corrective action plan in place at Nanny's Korner, the Division's Internal Review Panel reduced the administrative action to a written warning. However, Mr. Cromartie was still prohibited from being on the premises of Nanny's Korner while children were present. The Review Panel articulated the following rationale for its decision to issue the written warning and to prohibit Mr. Cromartie from being on Petitioner's premises during operational hours:

An eight-year old child disclosed to a medical professional who conducted a Child Medical Examination (CME) that on two separate occasions, Ricky Cromartie, the facility owner's husband, engaged in incidents of inappropriate touching at the facility, a violation of North Carolina General Statute 110-91(10) regarding care and treatment of children. The child also disclosed consistent information to the Department of Social Services and the Child Abuse/Neglect Consultant. Mr. Cromartie was the sole caregiver present at the facility at the time of the incidents. The child is no longer enrolled.

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The Review Panel noted that its decision to take the less severe administrative action of issuing a written warning in lieu of a special provisional license was due to the fact that Mrs. Cromartie “has complied [with] all written request[s] from [the Division].” However, the Review Panel determined that its decision to prohibit Mr. Cromartie from being at the facility during its operational hours should be upheld “as a result of the substantiation of child sexual abuse by the local department of social services” and would remain in place “unless substantiation is overturned.”

Petitioner filed a timely petition for a contested case hearing in the Office of Administrative Hearings (“OAH”) to challenge this decision and a hearing on the petition was held on 12 July 2011. After hearing the evidence, the Administrative Law Judge (“ALJ”) made numerous findings of fact, including the following:

39. None of the parents who testified at the hearing in this matter had any concerns about Mr. Cromartie caring for their children. These parents could not give any reasons why Mr. Cromartie should not be allowed to work at Nanny’s Korner[.]

....

43. None of the employees who testified at the hearing in this matter observed or had knowledge of any of the conduct which gave rise to the allegations of sexual abuse by Ricky Cromartie[.]

....

52. Petitioner also kept a communication log on [the minor child]. In her communication logs concerning [the minor child], Petitioner documented that [the minor child’s] mother had experienced behavior problems with [the minor child], and documented three incidents in which [the minor child] lied while at Petitioner’s facility.

....

69. Petitioner saw no indication, and received no reports of inappropriate touching or sexual misconduct towards children prior to November 6, 2009[.]

....

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85. Neither [the minor child] nor [the minor child's] mother testified at the contested case hearing. Neither [the minor child's] elementary school teacher, nor [the minor child's] guidance counselor, nor any one from the Robeson County Department of Social Services testified at the contested case hearing.

In its conclusions of law, the ALJ concluded that:

9. When there is a substantiation of child sexual abuse at a child care facility by a local department of social services, the Division may issue a written warning to the facility, although other more stringent remedies are also available to the Division. N.C. Gen. Stat § 110-105.2(b), (e)[.]
10. Respondent has the authority to permanently remove a substantiated child abuser or neglecter from child care pursuant to N.C. Gen. Stat. § 110-105.2(d).
11. The only issue before the undersigned is whether Respondent acted properly in issuing the written warning to Petitioner's family child care center, and in implementing the Corrective Action plan prohibiting Ricky Cromartie from being on the child care facility's premises while children are in care.
12. While the preponderance of the evidence before me raises serious questions and/or doubts about whether Mr. Cromartie sexually abused [the minor child] at Petitioner's center on November 5, 2009, the undersigned lacks the authority and/or jurisdiction to issue a formal determination on the merits of that substantiation. Review of the DSS' substantiation is located in another forum other than the Office of Administrative Hearings.

Accordingly, based on its findings of fact and conclusions of law, the ALJ determined that "Respondent's decisions to issue a written warning to Petitioner's child care center and to prohibit Petitioner's husband from being [on] the child care center premises while children are in care, should be AFFIRMED." On or about 12 March 2012, DHHS adopted the ALJ's order as its own Final Agency Decision.¹

1. In 2011, the General Assembly modified the contested case procedure set out in the Administrative Procedure Act ("APA") by amending and repealing numerous statutory

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Petitioner then filed a petition in superior court requesting judicial review of DHHS's Final Agency Decision pursuant to N.C. Gen. Stat. § 150B-36. On 9 January 2013, the superior court entered an order in which it concluded the following:

9. The Division has the authority to issue a written warning to a facility at which child abuse or neglect has been substantiated by the local department of social services and to "specify any corrective action to be taken by the operator." N.C.G.S. § 110-105.2(b)[.]
10. The Division also has the statutory authority to permanently remove a "substantiated abuser or neglecter from child care." N.C.G.S. § 110-105.2(d).
11. By statute, substantiations of child abuse or neglect are issued by the local departments of social services throughout the State of North Carolina. *See* N.C.G.S. § 7B-101, *et seq.*
-
13. Local units of government such as Robeson County Department of Social Services are not subject to OAH's jurisdiction because they are not an "agency" as defined by the APA. Therefore, a substantiation of child abuse or neglect is not subject to review in OAH. *See* N.C.G.S. § 150B-2(1a).
14. The Administrative Law Judge and the Agency properly held that the Agency's action was proper and within the Agency's authority as set out in the North Carolina Child Care Act, N.C.G.S. § 110-105.2.
15. The Agency's issuance of the Written Warning was not arbitrary or capricious.
16. The Agency's issuance of the Written Warning was supported by substantial evidence in the whole record.

provisions contained in Chapter 150B of the North Carolina General Statutes as well as several other statutory provisions affected by those procedures. 2011 N.C. Sess. Law 1678, 1685-97, ch. 398, §§ 15-55. These amendments became effective on 1 January 2012 and apply to contested cases commenced on or after that date. *See* 2011 N.C. Sess. Law 1678, 1701, ch. 398, § 63. However, because Petitioner's contested case was initiated on 21 July 2010, the General Assembly's 2011 modifications to the APA are inapplicable to the present case, so we conduct our review according to the statutory procedures that were in effect at the time Petitioner's contested case was filed with OAH.

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17. There is credible evidence in the record that Ricky Cromartie was a “substantiated abuser” as set forth in the North Carolina Child Care Act, N.C.G.S. § 110-105.2(d), and as such, the Agency had authority pursuant to statute to prevent him from being on the premises when children are in care.
18. Prohibiting Ricky Cromartie from being on the premises of Petitioner’s child care facility while children are in care was not arbitrary or capricious.

Based on its findings and conclusions, the superior court affirmed the Final Agency Decision. Petitioner gave timely notice of appeal from the superior court’s order.

II. Jurisdiction

Plaintiff’s appeal from the superior court’s order lies as of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013). *See also* N.C. Gen. Stat. § 150B-52 (2013).

III. Analysis

On appeal, Petitioner argues that the superior court erred as a matter of law by concluding that DHHS could rely on the local DSS substantiation of child abuse to support its issuance of a written warning, which prohibited Mr. Cromartie from being on the premises of the facility while children were present under Petitioner’s care.

“The North Carolina Administrative Procedure Act governs both trial and appellate court review of administrative agency decisions.” *Eury v. N.C. Emp’t Sec. Comm’n*, 115 N.C. App. 590, 596, 446 S.E.2d 383, 387 (citation omitted), *appeal dismissed and disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). “On judicial review of an administrative agency’s final decision, the substantive nature of each [issue on appeal] dictates the standard of review.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll (Carroll)*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004).

Pursuant to N.C. Gen. Stat. § 150B-51, a trial court is authorized to reverse or modify the agency’s decision

if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;

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- (2) In excess of the statutory authority or jurisdiction of the agency or the administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2011).

“The first four grounds for reversing or modifying an agency’s decision . . . may be characterized as ‘law-based’ inquiries,” while “[t]he final two grounds . . . may be characterized as ‘fact-based’ inquiries.” *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 (internal citations omitted). “It is well settled that in cases appealed from administrative tribunals, [q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support [an agency’s] decision are reviewed under the whole-record test.” *Id.* (alterations in original) (quotation marks and citation omitted).

“Under a *de novo* review, the superior court consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency’s judgment.” *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (alterations in original) (quotation marks and citation omitted). “Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency’s findings and conclusions.” *Henderson v. N.C. Dep’t of Human Res.*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). “The reviewing court must not consider only that evidence which supports the agency’s result; it must also take into account contradictory evidence or evidence from which conflicting inferences could be drawn.” *Id.* at 530–31, 372 S.E.2d at 890. However, the “whole record” test “does not permit the reviewing court to substitute its judgment for the agency’s as between two reasonably conflicting views.” *Lackey v. N.C. Dep’t of Human Res.*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). Instead, “the reviewing court must determine whether the administrative decision had a rational basis in the evidence.” *Henderson*, 91 N.C. App. at 531, 372 S.E.2d at 890.

“As to appellate review of a superior court order regarding an agency decision, the appellate court examines the trial court’s order for error

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of law.” *ACT-UP Triangle v. Comm’n for Health Serv. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quotation marks and citation omitted). “The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *Id.* (quotation marks and citation omitted). Here, Petitioner challenges DHHS’s statutory authority to issue a written warning and prohibit Mr. Cromartie from being on Petitioner’s premises while children were present pursuant to N.C. Gen. Stat. § 110-105.2. Accordingly, we review the superior court’s order to decide if the superior court, under a *de novo* review, erred in affirming the ALJ’s order.²

Petitioner argues that, in accordance with N.C. Gen. Stat. § 110-105.2, DHHS was required to conduct its own investigation and to independently substantiate whether a child had been abused at Nanny’s Korner before issuing a warning letter to Petitioner. For the following reasons, we agree and hold that a plain reading of the pertinent statutes and administrative rules places an affirmative duty on DHHS to independently substantiate abuse before it can issue a warning to a facility and mandate corrective action.

As we apply the pertinent statutory provisions to the present case, we are mindful that “[t]he paramount objective of statutory interpretation is to give effect to the intent of the legislature [and that] [t]he primary indicator of legislative intent is statutory language.” *In re Proposed Assessments v. Jefferson–Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal citation omitted). “Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole.” *Id.* (quotation marks and citation omitted). “Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.” *Id.* (quotation marks and citation omitted).

2. We note that with the exception of Petitioner’s unsupported assertion in its brief that its “due process rights will be severely impacted” as a consequence of DHHS’s Final Agency Decision, Petitioner does not bring forward a constitutional challenge to the superior court’s order on appeal. Therefore, because Petitioner has not advanced a substantive constitutional argument and because “[i]t is not the role of the appellate courts . . . to create an appeal for an appellant,” see *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh’g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), we lack any basis to engage in a constitutional analysis of the issue raised by Petitioner and instead confine our review to whether a violation of the North Carolina General Statutes—or any administrative rules promulgated pursuant to the General Statutes—occurred.

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Here, the plain meaning of the statutory and administrative language places an affirmative duty on DHHS to independently substantiate abuse, thereby precluding DHHS from treating a local DSS substantiation as dispositive.

The General Assembly established, within DHHS, a special unit—the Child Care Commission—“to deal primarily with violations involving child abuse and neglect in child care arrangements.” N.C. Gen. Stat. § 143B-168.5 (2013). The Child Care Commission was created by the General Assembly with the mandate that it “shall make rules for the investigation of reports of child abuse or neglect and for administrative action when child abuse or neglect is substantiated, pursuant to G.S. 110- 88(6a), 110 105, and 110-105.2.” *Id.*

Section 110-105.2(b) (2013) of our General Statutes provides:

When an investigation *pursuant to G.S. 110-105(a)(3)* substantiates that child abuse or neglect did occur in a child care facility, the Department may issue a written warning which shall specify any corrective action to be taken by the operator.

(Emphasis added).³ Thus, in order to invoke the disciplinary authority conferred by this statute, abuse or neglect must be substantiated in the manner prescribed by N.C. Gen. Stat. § 110-105(a)(3). That section makes clear that it is the responsibility of the Child Care Commission within DHHS to inspect child care facilities upon being notified of abuse and “to determine whether the alleged abuse or neglect has occurred.” N.C. Gen. Stat. § 110-105(a)(3) (2013). *See also* N.C. Gen. Stat. § 110-88(6a) (2013) (conferring disciplinary rule making power on the Child Care Commission “when the *Secretary’s investigations* pursuant to G.S. 110-105(a)(3) substantiate that child abuse or neglect did occur in the facility” (emphasis added)); 10A N.C. Admin. Code 09.1904(b) (“A written warning specifying corrective action to be taken by the operator of the child care center or home may be issued when the investigation is concluded and *the Division determines* that abuse or neglect occurred” (emphasis added)). Accordingly, a plain reading of the pertinent statutes and administrative rules requires DHHS to determine or substantiate an accusation of abuse. Any lack of specificity in the statutes concerning the process of substantiation cannot be construed to relieve DHHS of this responsibility.

3. “Specific corrective action required by a written warning . . . may include the permanent removal of the substantiated abuser or neglecter from child care.” N.C. Gen. Stat. § 110-105.2(d).

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Importantly, requiring DHHS to independently investigate and substantiate abuse does not undermine the investigative collaboration between DHHS and the local DSS encouraged by other pertinent statutes and administrative rules. *See, e.g.*, 10A N.C. Admin. Code 09.1903(a) (“Reports from law enforcement officers and other professionals, as well as photographs and other investigative tools, may be used as appropriate.”) and (c) (“The Division shall share information related to investigations with departments of social services, as appropriate.”). However, investigatory collaboration and the sharing of evidence does not, *ipso facto*, absolve DHHS of responsibility for independently determining or substantiating the occurrence of abuse. Stated differently, while DHHS may utilize evidence collected by the local DSS in its investigation, DHHS may not treat a local DSS substantiation as dispositive for purposes of discipline. Here, that seems to be exactly what happened.

The Final Agency Decision indicates that DHHS reduced the administrative action proposed in Ms. Miller’s Case Decision Summary from the issuance of a special provisional license to a written warning based on “Petitioner’s compliance with the corrective action plan in place at Petitioner’s facility.” However, “[Mr.] Cromartie was still prohibited from being on the premises of the facility while children were in care, *as a result of the substantiation of child sexual abuse by the local department of social services.*” (Emphasis added.) Thus, the record indicates that DHHS based its administrative action on the local DSS substantiation, not its own.

Moreover, Conclusions of Law 9 and 12 of the ALJ’s decision state:

9. When there is a substantiation of child sexual abuse at a child care facility by a local department of social services, the Division may issue a written warning to the facility, although more stringent remedies are also available to the Division. N.C. Gen. Stat. § 110-105.2(b), (e)[.]

....

12. While the preponderance of the evidence before me raises serious questions and/or doubts about whether Mr. Cromartie sexually abused [the minor child] at Petitioner’s center on November 5, 2009, the undersigned lacks the authority and/or jurisdiction to issue a formal determination on the merits of that substantiation. Review of the DSS’ substantiation is located in another forum other than the Office of Administrative Hearings.

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Plainly, the ALJ did not find the evidence of abuse presented at the hearing compelling, yet treated the local DSS substantiation as dispositive. The Superior Court's order also contains a finding indicating that the local DSS substantiation was treated as dispositive by the ALJ:

19. The Administrative Law Judge noted that DSS's substantiation of child abuse against Petitioner's husband is a violation of North Carolina Child Care law, N.C.G.S. § 110-105.2, and that the Division had the authority to issue the Written Warning and to prohibit Petitioner's husband from being present while children were in care *based upon the DSS substantiation* pursuant to that same statute.

(Emphasis added.) The Superior Court's order also concluded that local DSS substantiations could be treated as dispositive by DHHS for purposes of invoking DHHS's disciplinary authority:

9. The Division has the authority to issue a written warning to a facility at which child abuse or neglect has been substantiated by the local department of social services and to "specify any corrective action to be taken by the operator." N.C.G.S. § 110-105.2(b)[.]

....

14. The Administrative Law Judge and the Agency properly held that the Agency's action was proper and within the Agency's authority as set out in the North Carolina Child Care Act, N.C.G.S. § 110-105.2.

Because we find a clear statutory directive that DHHS independently substantiate abuse before taking administrative action, we hold that these conclusions are errors of law.

Furthermore, we find a statutory interpretation allowing local DSS substantiations to be dispositive before the ALJ particularly troubling on due process grounds where, as here, the local DSS substantiation report was admitted at the OAH hearing for the limited purpose of establishing that a substantiation had occurred:

[Counsel for DHHS]: And, Your Honor, we're happy to introduce this document for the sole purpose of noting the DSS conclusion, the substantiation of sexual abuse.

THE COURT: Okay.

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[Counsel for DHHS]: I have no objection to omitting the hearsay from the document.

THE COURT: Okay. So—

[Counsel for Petitioner]: So we would be redacting, I guess, “[the minor child] stated,” et cetera, “[the minor child] described,” et cetera, “[the minor child] had,” et cetera.

THE COURT: Okay.

[Counsel for DHHS]: Your Honor, I have no objection to that.

THE COURT: Okay. We can take care of that after the hearing. Okay. So Number 9 is allowed for the purpose stated by counsel.

Thus, none of the underlying facts in the report supporting DSS’s substantiation were admitted at the hearing and the local DSS representative did not testify. As a consequence, Petitioner was not afforded the ability to challenge the evidence or cross-examine the person who substantiated the abuse. Further, because the ALJ did not have jurisdiction to review the merits of the local DSS substantiation, Petitioner was powerless before the ALJ to challenge an unsupported assertion dispositive of her rights. An independent substantiation of abuse from DHHS, on the other hand, would be subject to review by the ALJ.

Article I, Section 1 of the North Carolina Constitution declares that “[w]e hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.” N.C. Const. art. I, § 1. Article I, Section 19 states that “[n]o person shall be taken, imprisoned, or dis-seized 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.” N.C. Const. art. I, § 19. As our Supreme Court has noted:

These fundamental guaranties are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty. The term “liberty,” as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is “deemed to embrace the right of man to

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be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation”

State v. Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (citation omitted); *see also Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957) (“The right to conduct a lawful business or to earn a livelihood is regarded as fundamental.” (quotation marks and citations omitted)). Furthermore, in another context, we have held that a “DSS investigation alone is plainly insufficient to support the loss of liberty that accompanies [placing a substantiated abuser’s name on a ‘Responsible Individuals List’].” *In re W.B.M.*, 202 N.C. App. 606, 619, 690 S.E.2d 41, 50 (2010). Thus, given the documented evidence in the record showing the impact of DHHS’s administrative action on Petitioner’s livelihood, Petitioner has arguably suffered a deprivation of her liberty interests guaranteed by our State’s constitution, necessitating a procedural due process analysis.

However, as noted above, Petitioner has not advanced a constitutional challenge to the trial court’s order on appeal, thereby limiting this Court’s review to whether a violation of the pertinent statutes and administrative rules has occurred. Nevertheless, we believe the constitutional issue should still affect this Court’s *statutory analysis* when attempting to discern legislative intent. “If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is well settled that the courts should construe the statute so as to avoid the constitutional question.” *Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465, 223 S.E.2d 323, 328 (1976). Because a statutory construction treating a local DSS substantiation as sufficient to support administrative action in this context raises a serious concern with respect to Petitioner’s due process rights, we find further support for the statutory interpretation requiring DHHS to independently substantiate claims of abuse before taking administrative action.

IV. Conclusion

For the foregoing reasons, we hold that the superior court order erred in concluding that DHHS could rely on the local DSS substantiation. Furthermore, because the record evidence reveals that the agency

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and the court below treated the local DSS substantiation as dispositive, we vacate the superior court's order and remand the matter to the trial court for further remand to DHHS with instructions to conduct an independent investigation to determine whether there is substantial evidence of abuse and for any needed additional administrative action in accordance with the statute.

VACATED AND REMANDED.

Judges ERVIN and DAVIS concur.

HAZEL B. SIMS, PLAINTIFF-APPELLANT

v.

GRAYSTONE OPHTHALMOLOGY ASSOCIATES, P.A.; GRAYSTONE SURGERY, LLC;
GRAYSTONE EYE SURGERY OF HICKORY, LP D/B/A GRAYSTONE EYE SURGERY
CENTER; GRAYSTONE OPHTHALMOLOGY SUGERY CENTER, PLLC; JAMES W.

HARRIS; RANDALL J. WILLIAMS; ANN K. JOSLYN; T. REGINALD WILLIAMS;
JOHN G. TYE; RALPH E. OURSLER; AND RICHARD I. CHANG, DEFENDANT-APPELLEES

No. COA13-870

Filed 20 May 2014

Negligence—summary judgment—genuine issue of material fact

The trial court erred in a negligence case arising out of injuries the 86-year-old plaintiff sustained when she fell from a rolling chair during a visit to her eye doctor by granting defendant's motion for summary judgment. There were genuine issues of material fact concerning whether defendant was negligent in causing plaintiff's injuries and whether plaintiff was negligent in contributing to her injuries.

Appeal by plaintiff from order entered 15 January 2013 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 6 January 2014.

Grant Richman, PLLC, by Robert M. Grant, Jr., for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III, for defendant-appellee.

McCULLOUGH, Judge.

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Hazel B. Sims (“plaintiff”) appeals from the trial court’s order granting summary judgment in favor of Graystone Ophthalmology Associates, P.A. (“defendant”). For the following reasons, we reverse.

I. Background

The underlying facts of this case were agreed to in stipulations by the parties. These stipulations can be summarized as follows: Plaintiff was a patient of Dr. James W. Harris of defendant and was present on the premises of defendant for a vision examination on 5 November 2007. While on defendant’s premises, plaintiff was seated on a rolling chair for her vision examination. After taking a seat, but prior to the examination, plaintiff fell from the rolling chair and fractured her right proximal humerus at the right shoulder and her right hip at the right intertrochanteric femur. Plaintiff incurred considerable costs for treatment and rehabilitation.

On 5 November 2010, plaintiff initiated this action by filing a complaint against defendant and others associated with defendant. In the complaint, plaintiff alleged the named defendants “were jointly and severally negligent . . . by placing [her] in the rolling stool or chair from which she fell . . . when they knew or should or [sic] known that such stools or chairs, without arms or handles, were dangerous to elderly patients such as [her]” and “[t]hat as the direct and proximate result of the negligence . . . , [she] has been damaged in excess of Ten Thousand Dollars (\$10,000.00).”

The named defendants answered plaintiff’s complaint on 26 May 2011 asserting various affirmative defenses, including contributory negligence. The named defendants later filed a motion for summary judgment on 4 December 2012.

Prior to a hearing on the motion for summary judgment, the parties stipulated that defendant was the proper party to be sued and all other named defendants were dismissed from the action. The motion for summary judgment then came on to be heard in Catawba County Superior Court on 14 January 2013, the Honorable Timothy S. Kincaid, Judge presiding.

Upon consideration of the pleadings, depositions, stipulations, and arguments of counsel, by order filed 15 January 2013, the trial court granted summary judgment in favor of defendant and taxed the costs of the action against plaintiff. Plaintiff filed notice of appeal on 14 February 2013.

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II. Discussion

The sole issue raised on appeal is whether the trial court erred in granting summary judgment in favor of defendant.

Standard of Review

“The standard of review for an order of summary judgment is firmly established in this state. We review a trial court’s order granting or denying summary judgment de novo.” *Variety Wholesalers, Inc. v. Salem Logistics Traffic Services, LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012).

[S]uch 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.” *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007) (citations and quotation omitted). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted).

In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party’s claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Collingwood v. General Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). “If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.” *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

“The trial court may not resolve issues of fact in deciding a motion for summary judgment and must deny the motion if there is a genuine issue as to any material fact.” *Daily Exp., Inc. v. Beatty*, 202 N.C. App. 441, 444, 688 S.E.2d 791, 795 (2010) (citing *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972)). “If there is any question as to

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the weight of evidence, summary judgment should be denied.” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999).

Negligence

Plaintiff contends the trial court erred in granting defendant’s motion for summary judgment in the present case because there are genuine issues of material fact concerning whether defendant was negligent in causing plaintiff’s injuries and whether plaintiff was negligent in contributing to her injuries.

As our appellate courts have long recognized, “[n]egligence claims and allegations of contributory negligence should rarely be disposed of by summary judgment.” *DeHaven v. Hoskins*, 95 N.C. App. 397, 402, 382 S.E.2d 856, 859, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989). This is because “ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person.” *Finley Forest Condominium Ass’n v. Perry*, 163 N.C. App. 735, 739, 594 S.E.2d 227, 230 (2004) (quoting *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985)). Yet, “summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury.” *Hahne v. Hanzel*, 161 N.C. App. 494, 497-98, 588 S.E.2d 915, 917 (2003) (emphasis omitted) (quoting *Williams v. Carolina Power & Light Co.*, 36 N.C. App. 146, 147, 243 S.E.2d 143, 144 (1978), *rev’d on factual grounds*, 296 N.C. 400, 250 S.E.2d 255 (1979)), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004).

“It is well established that in order to prevail in a negligence action, plaintiff[] must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages.” *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995). Even if evidence of negligence is presented, plaintiff cannot prevail if the evidence reveals plaintiff was contributorily negligent. *See Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998) (“In this state, a plaintiff’s right to recover in a personal injury action is barred upon a finding of contributory negligence.”).

In this case, it is uncontested that defendant owed plaintiff a duty of reasonable care and plaintiff suffered damages as a result of her fall from the rolling chair. But in response to plaintiff’s arguments that there are issues of fact concerning negligence and contributory negligence, defendant maintains, as it did below, that summary judgment is

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appropriate because there is no evidence of actionable negligence, there is no evidence of proximate cause, and, in the alternative, plaintiff was contributorily negligent as a matter of law. Considering the evidence in the light most favorable to plaintiff, we disagree with defendant and hold the issues of negligence and contributory negligence should have been presented to a jury. Thus, the trial court erred in granting summary judgment in favor of defendant.

In this case, the issue is not solely whether the chair was a dangerous condition, but, as plaintiff alleged in her complaint, whether defendant was negligent in placing plaintiff on the rolling chair from which she fell.

Viewing the evidence contained in the depositions and stipulations in the light most favorable to the plaintiff, the evidence tends to show the following: Plaintiff was 86 years old at the time of her fall. Plaintiff had been a patient of defendant's for over ten years, having two to three appointments per year. A typical appointment begins with a technician conducting a vision examination. Plaintiff recalled that the technician usually instructs her to take a seat on an armless rolling chair and move up to the table where the examination machine was located. This was common procedure and nothing different happened on the day plaintiff fell.

During plaintiff's deposition, plaintiff could not recall exactly what caused her to fall. But plaintiff did recall she never made it to the table. Plaintiff testified "I was trying to get my balance and I was trying to get up to the table, but I know I wasn't at the table 'cause I couldn't touch anything. It seemed like a long time, like I was fighting to get my balance."

Although plaintiff could not remember at her deposition how she fell, stipulations agreed to by the parties provide statements made by plaintiff during an interview just days after the incident. These statements indicate that after plaintiff was seated in the rolling chair, she leaned to place her purse on another chair in the examination room. Then, as plaintiff shifted her weight back down on the rolling chair, the chair started to roll. Plaintiff attempted to catch herself but there was nothing to grab onto and the chair slipped out from under her, causing plaintiff to fall.

Plaintiff testified no one had ever assisted her with the chair prior to her fall. Although plaintiff was aware the chair was on rollers, plaintiff testified she was unaware of how dangerous it could be. At appointments subsequent to her fall, defendant has assisted plaintiff with the chair.

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The evidence tends to show that the staff of defendant was aware of the dangers of the rolling chair. Specifically, the CEO of defendant testified that defendant was aware of one incident prior to plaintiff's fall in which a patient fell when a rolling chair slid out from underneath the patient while she was being seated. Furthermore, at the deposition of the technician performing plaintiff's vision examination on the day of the incident, the technician stated that it was her usual practice to hold the chair and place her foot on the bottom of the chair while a patient is being seated in order to keep the chair from rolling. Yet, when questioned about the specifics of how plaintiff was seated on the day of plaintiff's fall, the technician indicated she had no specific recollection. The technician did not witness the fall as she was facing away from plaintiff at the time of the fall.

We hold this evidence sufficient to carry the issue of negligence to a jury for determination of whether defendant exercised the degree of care that a reasonable and prudent person would exercise under the circumstances. Although defendant's use of the rolling chair may not itself be negligent, instructing an elderly patient with a purse to sit on the rolling chair and move up to the examination table without offering assistance may be found to be negligent. Additionally, the evidence supports plaintiff's argument that the nature of the rolling stool, i.e. the rollers and lack of arms, was the proximate cause of plaintiff's fall.

Defendant further argues that if it was negligent, summary judgment is appropriate because the danger was open and obvious. *See Kelly v. Regency Centers Corp.*, 203 N.C. App. 339, 343, 691 S.E.2d 92, 95 (2010) ("There is no duty to protect a lawful visitor from dangers which are either known to him or so obvious and apparent that they may reasonably be expected to be discovered."). While plaintiff was aware the chair was on rollers, in this case, plaintiff was instructed to sit on the rolling chair and move up to the table. Although plaintiff's actions may be found by the jury to constitute contributory negligence, we hold the evidence does not establish contributory negligence as a matter of law.

III. Conclusion

Taking the evidence in the light most favorable to plaintiff, we hold material issues of fact exist as to whether defendant was negligent and whether plaintiff was contributorily negligent. Thus, we hold the trial court erred in entering summary judgment in favor of defendant.

Reversed.

Chief Judge MARTIN and Judge ERVIN concur.

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STATE OF NORTH CAROLINA

v.

SHARKEEM JAMMARCUS FOUSHEE

No. COA13-846

Filed 20 May 2014

1. Appeal and Error—appellate rules violations—admonition

Although the Court of Appeals denied defendant's motion to dismiss the State's appeal based on numerous violations of the appellate rules, counsel for the State was strongly admonished to strictly adhere to all applicable provisions of the North Carolina Rules of Appellate Procedure in the future.

2. Appeal and Error—appealability—imposition of lesser discovery sanctions

The Court of Appeals limited its review of the State's challenge to the trial court's order to a consideration of the lawfulness of the trial court's decision to dismiss the two obtaining property by false pretenses charges. The General Statutes do not provide a similar right of appeal with regard to the imposition of lesser discovery sanctions upon the State.

3. Discovery—violations—misapprehension of law

The trial court erred by dismissing two counts of obtaining property by false pretenses based on a misapprehension of law concerning the extent to which a discovery violation actually occurred. The trial court's order was reversed and remanded.

Appeal by the State from order entered 19 February 2013 by Judge R. Allen Baddour in Durham County Superior Court. Heard in the Court of Appeals 9 December 2013.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for Defendant.

ERVIN, Judge.

The State has sought appellate review of an order dismissing two counts of obtaining property by false pretenses that had been lodged

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against Defendant Sharkeem Jammarcus Foushee and precluding the State from calling certain witnesses to testify at the trial of a separate felonious larceny charge that had been lodged against Defendant, with both of these decisions resting on the trial court's determination that the State had violated the provisions of N.C. Gen. Stat. § 15A-903. On appeal, the State argues that the trial court erroneously dismissed the obtaining property by false pretenses charges on the grounds that the State had not, in fact, violated the applicable discovery statutes. After careful consideration of the State's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Durham County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

On 17 July 2012, a warrant for arrest charging Defendant with one count of felonious larceny and two counts of obtaining property by false pretenses was issued. According to the allegations contained in the warrant, Defendant took twenty-six rings and a pair of earrings with a total value of \$17,655 belonging to Alfreda Andrews and pawned four of the rings at Friendly Jewelry and Pawn Shop based upon a representation that he owned the property in question. On 17 September 2012, the Durham County grand jury returned a bill of indictment charging Defendant with one count of felonious larceny and two counts of obtaining property by false pretenses based on the same factual allegations set out in the earlier warrant for arrest.

On 24 September 2012, Defendant filed a request for formal arraignment, a motion to preserve evidence, and a request for voluntary discovery. On 26 September 2012, Defendant filed a motion for discovery. On 3 October 2012 and 13 February 2013, respectively, the State responded to Defendant's discovery requests.

On 13 February 2013, Defendant filed two motions *in limine*. In the first motion, Defendant requested that the trial court (1) order the State to certify that it had complied with the provisions of N.C. Gen. Stat. § 15A-903; (2) prohibit the State from introducing evidence that had not been provided to Defendant; and (3) order the State to comply with N.C. Gen. Stat. §§ 15A-903(a)(1)(a) and 15A-903(a)(1)(c) by providing Defendant with a copy of any new statements made by any witness before that witness was called to testify. In the second motion, Defendant requested that the trial court prohibit the State from introducing or referring to any extra-judicial statements made by any person

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who was not going to testify at trial. On 13 February 2013, the State provided Defendant with a supplemental discovery response and a certification that all materials subject to discovery had been provided to Defendant.

On 18 February 2013, Defendant filed two dismissal motions. In the first of these motions, Defendant requested that all of the charges that had been lodged against him be dismissed as the result of alleged discovery violations stemming from the State's failure to interview and provide statements from certain witnesses. More specifically, Defendant alleged in the first dismissal motion that the State had been made aware that Ms. Andrews' children, Chynna Andrews and Carlston Andrews, had been on the premises of the family home at the time that the stolen jewelry had become missing, that Chynna and Carlston Andrews might possess potentially exculpatory information, and that the State had wilfully failed to interview them. In the second of these motions, Defendant requested that all of the charges that had been lodged against him be dismissed as the result of certain alleged discovery violations stemming from the State's failure to obtain and preserve a surveillance video from the pawn shop. More specifically, Defendant alleged in the second dismissal motion that, despite having knowledge that a potentially exculpatory surveillance video had been made at Friendly Jewelry and Pawn, the State had negligently failed to obtain the video prior to its destruction, which had occurred approximately six months after the date upon which the stolen jewelry was pawned there.

A hearing was held with respect to Defendant's dismissal motions before the trial court on 18 February 2013. After hearing arguments concerning the merits of Defendant's dismissal motions, the trial court entered an order concluding that the State had failed to "use reasonable diligence to investigate, preserve, document, or make [the surveillance video] available" "or [to obtain] any relevant evidence" from two witnesses who had been present at the time that one of the alleged offenses was committed in violation of the State's discovery obligations as prescribed in N.C. Gen. Stat. § 15A-903. Based upon this set of determinations, the trial court sanctioned the State by dismissing the two counts of obtaining property by false pretenses that had been lodged against Defendant and ordering that the State be precluded from calling Chynna or Carlston Andrews to testify at Defendant's trial for felonious larceny. After the trial court denied a motion to continue the trial of the felonious larceny charge, the State took a voluntary dismissal with respect to that charge. The State noted an appeal to this Court from the trial court's order.

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On 7 October 2013, Defendant filed a motion to dismiss the State's appeal or, in the alternative, a motion to strike the record on appeal and portions of the State's brief on the basis that the State had committed numerous violations of the North Carolina Rules of Appellate Procedure. On 16 October 2013, the State filed a response to Defendant's motion and an alternative petition seeking the issuance of a writ of *certiorari* authorizing appellate review of the trial court's order. On 18 October 2013, Defendant filed a response to the State's *certiorari* petition.

II. Substantive Legal Analysis

A. Motion to Dismiss Appeal

[1] As an initial matter, we must address Defendant's motion to dismiss the State's appeal or, in the alternative, to strike the record on appeal and portions of the State's brief. Although Defendant is certainly correct in contending that the State has violated numerous provisions of the North Carolina Rules of Appellate Procedure,¹ "we dismiss appeals 'only in the most egregious instances of nonjurisdictional default[.]'" *Carolina Forest Ass'n, Inc. v. White*, 198 N.C. App. 1, 6, 678 S.E.2d 725, 729 (2009) (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008)); see also 5 Am.Jur.2d Appellate Review § 804, at 540 (stating that "it is preferred that an appellate court address the merits of an appeal whenever possible," so that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal"). As a result of the fact that the State's violations of the North Carolina Rules of Appellate Procedure are nonjurisdictional in nature and, while troubling, do not rise to the level of a "substantial failure" to comply with or a "gross violation" of the applicable rule provisions, we conclude, in the exercise of our discretion, that we should review the State's challenge to the validity of the trial court's order on the merits rather than dismissing the State's appeal. *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. Put another way, "we believe [that] the fundamental principle of *Dogwood*, to 'promote public confidence in the administration of justice in our

1. Among the rules violations upon which Defendant's motion was predicated are that (1) Defendant's dismissal motions and "other papers" were missing a critical page and were treated as attachments rather than included in the record on appeal; (2) a number of other important documents were treated as attachments rather than included as part of the record on appeal; (3) the pages in the record on appeal and attachments were not individually and consecutively numbered; (4) Defendant's social security number was not redacted from the documents included in the record on appeal; (5) the State failed to provide the court reporter with the appellate docket number or request that the transcript be electronically filed; and (6) the State's brief failed to "define clearly the issues presented to the reviewing court."

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appellate courts[.]’ does not necessitate dismissal in the instant case.” *Carolina Forest*, 198 N.C. App. at 6-7, 678 S.E.2d at 729. As a result, although we deny Defendant’s motion to dismiss the State’s appeal, we strongly admonish counsel for the State to strictly adhere to all applicable provisions of the North Carolina Rules of Appellate Procedure in the future.

B. Appealability of Orders Imposing Discovery Sanctions

[2] Secondly, we must determine the extent to which the trial court’s order is subject to appeal by the State. “The right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed.” *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982). “The State’s right of appeal is granted by [N.C. Gen. Stat.] § 15A-1445.” *State v. Watkins*, 189 N.C. App. 784, 785, 659 S.E.2d 58, 60 (2008). “N.C. Gen. Stat. § 15A-1445(a) (1) allows the State to appeal from a ‘decision or judgment dismissing criminal charges as to one or more counts.’” *State v. Dorman*, __ N.C. App. __, __, 737 S.E.2d 452, 470 (quoting N.C. Gen. Stat. § 15A-1445(a) (1)), *disc. review denied*, __ N.C. __, 743 S.E.2d 206 (2013). “The General Statutes do not provide a similar right of appeal with regard to the imposition of lesser discovery sanctions upon the State.” *Id.* at __, 737 S.E.2d at 470-71. As a result, the State has the right to appeal a trial court order dismissing a criminal charge while lacking the authority to appeal an order imposing a lesser sanction.

Although the trial court granted Defendant’s motion to dismiss the two counts of obtaining property by false pretenses that had been lodged against Defendant, it simply precluded the State from offering the testimony of certain potential witnesses in the felonious larceny case. Moreover, the State voluntarily dismissed the felonious larceny charge after the trial court denied its continuance motion. Although the State’s notice of appeal stated that it was appealing from the order “in which the Court dismissed two counts of Obtaining Property by False Pretenses and prohibited the State from introducing the testimony of two witnesses” and although the State clearly has the right to seek appellate review of that portion of the trial court’s order challenging the dismissal of the obtaining property by false pretenses charges, *see State v. Newman*, 186 N.C. App. 382, 385, 651 S.E.2d 584, 587 (2007) (stating that “under the plain language of N.C. Gen. Stat. § [15A-]1445(a)(1), the State has a right to appeal the dismissal of one count and this appeal is not interlocutory”), *disc. review denied*, 362 N.C. 478, 667 S.E.2d 234 (2008), the fact that “[t]he General Statutes do not provide a similar right of appeal with regard to the imposition of lesser discovery sanctions

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upon the State,” *Dorman*, __ N.C. App. at __, 737 S.E.2d at 470-71, necessitates a determination that the State lacks the right to seek appellate review of that portion of the trial court’s order precluding the presentation of any testimony from Chynna and Carlston Andrews at the trial of the felonious larceny case. As a result, we will limit our review of the State’s challenge to the trial court’s order to a consideration of the lawfulness of the trial court’s decision to dismiss the two obtaining property by false pretenses charges.²

C. Validity of the Trial Court’s Dismissal Decision

[3] In its brief, the State contends that the trial court erred by dismissing the two counts of obtaining property by false pretenses based upon the State’s failure to comply with the provisions of N.C. Gen. Stat. § 15A-903. More specifically, the State contends that certain of the trial court’s findings of fact lacked adequate evidentiary support³ and that the trial court erroneously concluded as a matter of law that the failure to obtain and preserve the surveillance video taken at the establishment at which Ms. Andrews’ jewelry was pawned constituted a violation of Defendant’s rights under the applicable discovery statutes. The State’s argument has merit.

1. Standard of Review

A determination of the extent, if any, to which the State failed to comply with its obligation to provide discovery to a criminal defendant is a decision left to the sound discretion of the trial court. *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995). For that reason, this Court “review[s] a [trial court’s] ruling on discovery matters for an abuse of discretion.” *State v. Pender*, __ N.C. App. __, __, 720 S.E.2d 836, 841, *disc. review denied*, 366 N.C. 233, 731 S.E.2d 414 (2012). “The trial court may be reversed for an abuse of discretion in this regard only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.’” *State v. Cook*, 362 N.C. 285, 295,

2. The State candidly concedes that, despite the reference to the portion of the trial court’s order precluding it from presenting certain testimony at the trial of the felonious larceny charge in its notice of appeal, it has no right to appeal from that portion of the trial court’s order imposing sanctions in the felonious larceny case, stating that, “[a]lthough the trial court’s order regarding the larceny charge was also incorrect, the State has not attempted to appeal that order.”

3. Although the parties have expended considerable energy debating the sufficiency of the record support for the trial court’s findings of fact in their briefs, we need not address those contentions given our ultimate determination that, in light of the facts found in the trial court’s order, no discovery violation occurred.

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661 S.E.2d 874, 880 (2008) (quoting *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d 662, 667 (1987)). “When discretionary rulings are made under a misapprehension of the law, [however,] this may constitute an abuse of discretion.” *State v. Tuck*, 191 N.C. App. 768, 771, 664 S.E.2d 27, 29 (2008) (quotations omitted).

2. Basic Principles of Criminal Discovery

“It is now well settled in North Carolina that the right to discovery is a statutory right.” *Tuck*, 191 N.C. App. at 771, 664 S.E.2d at 29. According to N.C. Gen. Stat. § 15A-903, “upon a motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.” N.C. Gen. Stat. § 15A-903(a)(1). “The term ‘file’ includes the defendant’s statements, the codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.” N.C. Gen. Stat. § 15A-903(a)(1)(a).

“The State, however, is under a duty to disclose only those matters in its possession and ‘is not required to conduct an independent investigation’ to locate evidence favorable to a defendant.” *State v. Chavis*, 141 N.C. App. 553, 561, 540 S.E.2d 404, 411 (2000) (quoting *State v. Smith*, 337 N.C. 658, 664, 447 S.E.2d 376, 379 (1994)). “[W]e note that this Court has interpreted the provisions of [N.C. Gen. Stat. §] 15A-903 to require production by the State of *already existing documents*.” *Dorman*, __ N.C. App. at __, 737 S.E.2d at 471. As a result, “[t]he statute imposes no duty on the State to create or continue to develop additional documentation regarding an investigation.” *Id.*

“If a trial court determines that the State has violated statutory discovery provisions or a discovery order, it may impose a wide array of sanctions[,] including dismissal of the charge with or without prejudice.” *Dorman*, __ N.C. App. at __, 737 S.E.2d at 470. “However, prior to imposing any [] sanctions, the trial court must ‘consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply’ with the discovery requirements.” *State v. Jaaber*, 176 N.C. App. 752, 755, 627 S.E.2d 312, 314 (2006) (quoting N.C. Gen. Stat. § 15A-910(b)). “If the court imposes any sanction, it must make specific findings justifying the imposed sanction.” N.C. Gen. Stat. § 15A-910(d). “‘Given that dismissal of charges is an ‘extreme sanction’ which should not be routinely imposed, orders dismissing charges

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for noncompliance with discovery orders preferably should also contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed.’” *Dorman*, __ N.C. App. at __, 737 S.E.2d at 470 (quoting *State v. Allen*, __ N.C. App. __, __, 731 S.E.2d 510, 527-28 (internal quotation marks and citations omitted), *disc. review denied*, 366 N.C. 415, 737 S.E.2d 377 (2012), *cert. denied*, __ U.S. __, 133 S. Ct. 2009, 185 L. Ed. 2d 876 (2013)).

3. Extent to Which Discovery Violation Occurred

According to the argument that Defendant advanced in the trial court and that the trial court accepted in its order, the State violated the discovery-related provisions of N.C. Gen. Stat. § 15A-903 by negligently failing to obtain and preserve the pawn shop surveillance video.⁴ More specifically, Defendant asserted in his dismissal motion stemming from the loss and destruction of the surveillance video that his trial counsel notified the State on 7 August 2012 that there was reason to believe that Chynna Andrews had been at the pawn shop on the date of the alleged offense and inquired if the State had obtained a surveillance video from the pawn shop on the theory that this video might “show Chynna Andrews at the pawn shop.” Approximately two or three weeks before 18 February 2013, the date upon which Defendant’s trial was scheduled to begin, Defendant’s trial counsel made another inquiry about the extent to which the State had obtained the pawn shop surveillance video. As a result of this inquiry, the prosecutor spoke with an investigator who “went down to the pawn shop and asked about a video,” ultimately learning “that after six months it had been destroyed.” Based upon this set of facts, Defendant argued that the State was “aware of evidence that could be exculpatory and acted with negligence to allow it to be destroyed” contrary to the discovery-related obligations to which the State was subject pursuant to N.C. Gen. Stat. § 15A-903. We do not

4. On appeal, Defendant has not attempted to defend the trial court’s dismissal decision as a proper exercise of the trial court’s authority to sanction a discovery violation by the State. Instead, Defendant argues that the trial court’s order should be upheld based upon a trial tribunal’s inherent authority “to do all things that are reasonably necessary for the proper administration of justice.” *Beard v. North Carolina State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). We will not, however, address Defendant’s “inherent authority” argument on the merits given the trial court’s failure to adopt such a rationale as the basis for its dismissal order. As a result, Defendant will, of course, remain free to seek any available relief stemming from the loss of the surveillance video based on any theory other than an alleged violation of the State’s statutory discovery obligations during the course of the proceedings on remand.

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find Defendant's argument, which provided the basis for the trial court's decision, persuasive.

A careful review of the record reveals no indication that the surveillance video at issue here was ever in the State's possession. Given that "[t]he State . . . is under a duty to disclose only those matters in its possession and 'is not required to conduct an independent investigation' to locate evidence favorable to a defendant," *Chavis*, 141 N.C. App. at 561, 540 S.E.2d at 411 (quoting *Smith*, 337 N.C. at 664, 447 S.E.2d at 379), the State was under no statutory obligation to obtain and provide the pawn shop surveillance video to Defendant. As a result, given that the record contains no support for the trial court's determination that the State failed to comply with the discovery-related obligations imposed by N.C. Gen. Stat. § 15A-903 stemming from its failure to obtain, preserve, and disclose the pawn shop surveillance video to Defendant, the trial court's decision that the State did not comply with the mandates of N.C. Gen. Stat. § 15A-903 rested upon a misapprehension of the applicable law sufficient to render its decision to dismiss the obtaining property by false pretenses charges that had been lodged against Defendant an abuse of discretion. *Tuck*, 191 N.C. App. at 771, 664 S.E.2d at 29. As a result, given that the trial court's decision to dismiss the obtaining property by false pretenses charges rested upon a misapprehension of law concerning the extent to which a discovery violation actually occurred, the trial court's order should be reversed and this case should be remanded to the Durham County Superior Court for further proceedings not inconsistent with this opinion.⁵

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by dismissing the two counts of obtaining property by false pretenses that had been lodged against Defendant based on the State's alleged failure to comply with its discovery obligations under N.C. Gen.

5. Aside from the issue discussed in the text, the trial court's order does not "detail the perceived prejudice to the defendant" that would "justif[y] the extreme sanction imposed." *Dorman*, __ N.C. App. at __, 737 S.E.2d at 470. "Absent a finding explaining the specific and continuing prejudice [the d]efendant will suffer," a trial court is not authorized to dismiss a pending criminal case as a sanction for a discovery violation by the State. *Id.* Thus, wholly aside from the fact that the record does not, in fact, disclose the existence of any discovery violation relating to the failure to obtain and preserve the pawn shop surveillance video, we would also be required to reverse the trial court's dismissal order based upon its failure to delineate the "specific and continuing" prejudice to which Defendant would be subject as a result of the alleged discovery violation.

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Stat. § 15A-903. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Durham County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
TIYOUN JIMEK JACKSON

No. COA13-743

Filed 20 May 2014

1. Appeal and Error—failure to file written appeal—untimely oral appeal—writ of certiorari granted

Where defendant had lost his right to appeal the trial court's order denying his motion to suppress by failing to file a written appeal from the order and failing to enter timely oral notice of appeal, defendant's writ of certiorari was granted and the Court of Appeals reviewed defendant's appeal on the merits.

2. Search and Seizure—reasonable articulable suspicion—insufficient evidence

The trial court erred by denying defendant's motion to suppress. The finding of fact that the officer had recovered a stolen gun from defendant during a prior encounter with defendant was not supported by the evidence. Furthermore, under the totality of the circumstances, the police officer lacked the reasonable articulable suspicion of criminal activity needed to justify an investigatory stop. Moreover, because the stop was unlawful, defendant's subsequent consent to the officer's search of his person was invalid.

DILLON, Judge, dissenting.

Appeal by Defendant from order entered 10 January 2013 by Judge C.W. Bragg and judgment entered 22 January 2013 by Judge A. Robinson

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Hassell in Guilford County Superior Court. Heard in the Court of Appeals 5 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General J. Aldean Webster III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant.

STEPHENS, Judge.

Procedural and Factual Background

In this appeal, Defendant Tiyoun Jimék Jackson challenges the trial court's denial of his motion to suppress evidence discovered by Officer Timothy D. Brown of the Greensboro Police Department following an investigatory stop of Defendant on the night of 9 April 2012.

The order denying Defendant's motion to suppress includes the following pertinent findings of fact:

1. [Officer] Brown is and has been an officer for the Greensboro Police Department since August 15, 2009.
2. Officer Brown based on training and experience is familiar with marijuana and other narcotic drugs.
3. Officer Brown was on duty and in uniform on Monday, April 9, 2012.
4. Prior to April 9, 2012, Officer Brown had on two occasions contact with [D]efendant
5. On the first occasion, Officer Brown investigating a report of the discharging of a firearm spoke with [D]efendant . . . concerning that incident and recovered from him a stolen firearm.
6. Approximately two months prior to April 9, 2012, Officer Brown was investigating a breaking and entering in the area of Lombardi Street in Greensboro, North Carolina and again came into contact with [D]efendant
7. . . . [D]efendant . . . was standing with 3 to 4 individuals in the area of the reported breaking and entering.

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8. As Officer Brown approached he could smell the odor of marijuana.
9. Officer Brown conducted a search of the individuals including [D]efendant
10. Officer Brown did find an amount of marijuana, but not on the person of [D]efendant
11. On April 9, 2012, Officer Brown was assigned and was patrolling zone 450 in a marked patrol car.
12. Officer Brown at approximately 9:00 pm was patrolling in the vicinity of Kim's Mart located at 2200 Phillips Avenue.
13. Based on Officer Brown's experience as a Greensboro Police Officer he knows that the immediate area outside of Kim's Mart has been the location of hundreds of narcotic investigations some resulting in arrests.
14. Officer Brown has personally made drug arrests in the immediate area of Kim's Mart.
15. Officer Brown is personally aware that hand-to-hand drug transactions have taken place on the sidewalk and street directly adjacent to Kim's Mart as well as inside Kim's Mart.
16. At approximately 9:00 pm on April 9, 2012 Officer Brown saw [D]efendant . . . and Curtis M. Benton standing near the newspaper dispenser outside of Kim's Mart.
17. Two days prior Officer Brown conducted a motor vehicle stop in which Curtis M. Benton was riding.
18. During the motor vehicle stop, Officer Brown noticed the smell of marijuana coming from the car.
19. [D]efendant . . . and Curtis M. Benton upon spotting Officer Brown in his marked patrol car stopped talking and dispersed.
20. [D]efendant . . . went to the East and walked into Kim's Mart and Curtis M. Benton walked away, in the opposite direction, to the West.

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21. Officer Brown testified that his training and experience indicate that upon the approach of a law enforcement officer, two individuals engaged in a drug transaction will separate and walk away in opposite directions.
22. Officer Brown continued past Kim's Mart and down Phillips Avenue.
23. After losing sight of [D]efendant . . . and Curtis M. Benton, Officer Brown made a u-turn and headed back up Phillips Avenue toward Kim's Mart.
24. As Officer Brown again approached Kim's Mart, [D]efendant . . . and Curtis M. Benton were again standing in front of Kim's Mart approximately 20 feet from where Officer Brown saw them originally.
25. Officer Brown pulled into the parking lot at Kim's Mart.
26. As Officer Brown was pulling into the parking lot at Kim's Mart, [D]efendant . . . and Curtis M. Benton again separated and began walking away in opposite directions.
27. As [D]efendant . . . was walking away from Kim's Mart, he came within 5-10 feet of Officer Brown's patrol car.
28. Officer Brown wanted to speak with [D]efendant . . . about possible drug activity.
29. Officer Brown asked [D]efendant . . . to place his hands on the patrol car
30. [D]efendant . . . placed his hands on the front left fender of Officer Brown's patrol car.

Based on these findings, the court concluded "[t]hat based on the totality of the circumstances . . . Officer Brown had a reasonable and articulable suspicion that criminal activity was afoot" and "was legally permitted to make a brief investigatory stop of [D]efendant[.]" The court further found and concluded that Defendant thereafter "consented to a search of his person by Officer Brown" which led to the discovery of a handgun.¹

1. A subsequent search of Benton yielded "a bag containing a multitude of smaller bags of marijuana."

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While reserving the right to appeal the denial of his motion, *see* N.C. Gen. Stat. § 15A-979(b) (2013), Defendant pled guilty on 7 January 2013 to possession of a firearm by a felon, possession of a firearm with an altered serial number, and conspiracy to possess with intent to sell or deliver marijuana. The trial court consolidated Defendant's offenses for judgment, suspended a prison sentence of twelve to twenty-four months, and placed him on twenty-four months of supervised probation.

Appellate Jurisdiction

[1] Defendant has filed a petition for writ of *certiorari*, acknowledging a jurisdictional defect in his notice of appeal, to wit, that he did not initially appeal from the final judgment as required by N.C.R. App. P. 4(b), but rather appealed only from the denial of his suppression motion. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010) (dismissing appeal for lack of jurisdiction where the “[d]efendant did file . . . a written notice of appeal from the denial of [the d]efendant’s motion to suppress, but [the d]efendant did not appeal from his judgment of conviction”) (internal quotation marks omitted). Further, Defendant gave oral notice of appeal thirteen days after the judgment was filed, rather than at trial as required by N.C.R. App. P. 4(a)(1). *See State v. Hammonds*, __ N.C. App. __, __, 720 S.E.2d 820, 823 (2012) (granting writ of *certiorari* after dismissing an appeal for inadequate notice where the defendant’s counsel attempted to give oral notice of appeal to the trial court days after the trial and not “at trial” as required by Rule 4).

As a result, Defendant’s “right to prosecute an appeal has been lost by [his] failure to take timely action[.]” N.C.R. App. P. 21(a)(1). The State has neither moved to dismiss Defendant’s appeal nor opposed our review by writ of *certiorari*. Accordingly, we grant the requested writ and review Defendant’s challenges to the denial of his suppression motion on the merits.

Motion to Suppress

[2] Defendant argues that the court erred in denying his motion to suppress because Officer Brown lacked the reasonable articulable suspicion of criminal activity needed to justify an investigatory stop. *See, e.g., State v. Battle*, 109 N.C. App. 367, 370, 427 S.E.2d 156, 158 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)). Because the stop was unlawful, Defendant further contends that his subsequent consent to Officer Brown’s search of his person was invalid. We agree.

In reviewing the denial of a motion to suppress, our task is to determine “whether competent evidence supports the trial court’s findings of

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fact and whether the findings of fact support the conclusions of law.” *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). Findings not challenged by Defendant “are deemed to be supported by competent evidence and are binding on appeal.” *Id.* (citation omitted). We review *de novo* a trial court’s conclusion of law that an “officer had reasonable suspicion to detain a defendant[.]” *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001) (citation omitted).

Here, Defendant challenges only finding of fact 5, which states that Officer Brown recovered a stolen gun from Defendant during a prior encounter with Defendant and another individual. The evidence, however, shows that, although Officer Brown did recover a stolen firearm during that encounter, “[D]efendant was not the one that was actually charged in that[.]” This finding of fact is not supported by competent evidence, and, accordingly, we do not consider it in analyzing Defendant’s challenge to the trial court’s ultimate conclusion that Officer Brown had a reasonable suspicion of criminal activity justifying an investigatory stop.²

“The Fourth Amendment protects the right of the people against unreasonable searches and seizures. It is applicable to the states through the Due Process Clause of the Fourteenth Amendment. It applies to seizures of the person, including brief investigatory detentions[.]” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citations, internal quotation marks, and ellipsis omitted). Accordingly, “[a]n investigatory stop must be justified by ‘a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.’” *Id.* at 441, 446 S.E.2d at 70 (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). “A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists.” *Id.* (citation and internal quotation marks omitted). “This process allows officers to draw on their own experience and specialized training to make inferences from

2. We note that no evidence was introduced and no finding of fact was made that Defendant had any criminal history, much less that Officer Brown was aware of any previous criminal activity by Defendant. Further, even had such evidence been introduced, “a prior criminal record is not, standing alone, sufficient to create reasonable suspicion.” *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (citation and internal quotation marks omitted). As for the findings of fact concerning Benton’s criminal history, “[t]here is no reasonable suspicion merely by association.” *Id.* at 539; see also *State v. Smith*, __ N.C. App. __, __, 729 S.E.2d 120, 125 (noting that “a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person”) (citations and internal quotation marks omitted), *disc. review denied*, 366 N.C. 396, 735 S.E.2d 190 (2012).

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and deductions about the cumulative information available to them that might well elude an untrained person.” *State v. Williams*, 366 N.C. 110, 116-17, 726 S.E.2d 161, 167 (2012) (citation and internal quotation marks omitted). However, case law has drawn clear limits on what inferences are constitutionally permissible when an officer observes a citizen in an area known for illegal drug activity or other criminal activity.

“[T]he presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, *coupled with evasive actions by [a] defendant*[], is] sufficient to form reasonable suspicion to stop an individual.” *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) (citation omitted; emphasis added). While what constitutes an “evasive action” has never been explicitly defined, a careful review of case law from this State’s appellate courts and from the United States Supreme Court reveals that merely walking away from one’s companion in the presence of law enforcement officers cannot be considered an evasive action which, when coupled with one’s presence in an area known for drug sales or other illegal activity, will support the warrantless stop of a citizen.

For example, in *State v. Fleming*,

at the time [the officer . . . first observed [the] defendant and his companion, they were merely standing in an open area between two apartment buildings [in a “high drug area”]. At this point, they were just watching the group of officers standing on the street and talking. *The officer observed no overt act by [the] defendant at this time nor any contact between [the] defendant and his companion.* Next, the officer observed the two men walk between two buildings, out of the open area, toward Rugby Street and then begin walking down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that [the] defendant was involved in criminal conduct, *it being neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers.*

106 N.C. App. 165, 170-71, 415 S.E.2d 782, 785 (1992) (emphasis added). Thus, *walking away from law enforcement officers with one’s companion after watching law enforcement officers* is not suspicious and, even when coupled with being present in an area known for drugs, cannot create the reasonable suspicion needed to justify a stop. *Id.*; see also *In re J.L.B.M.*, 176 N.C. App. 613, 620, 627 S.E.2d 239, 245 (2006) (holding

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there was no reasonable suspicion where an officer “relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the ‘Hispanic male’ description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car”).

In *Brown*, two police officers observed [the] defendant and another person walking away from one another in an alley. The officers drove into the alley, approached [the] defendant and asked him to identify himself and to explain what he was doing there. [The d]efendant refused and told the officers they had no right to stop him. One of the officers told [the] defendant he was in a high drug area; the other officer then frisked [the] defendant and found nothing. At trial, one officer testified that he had stopped [the] defendant because the situation looked suspicious and he had never seen that subject in that area before. Further, the area where [the] defendant was stopped had a high incidence of drug traffic. The officers never claimed to suspect [the] defendant of any specific misconduct, nor did they have any reason to believe [the] defendant was armed.

Fleming, 106 N.C. App. at 170, 415 S.E.2d at 785 (internal quotation marks omitted) (discussing the circumstances present in *Brown*, which did not create the reasonable suspicion needed to sustain a stop). Thus, *walking away from one’s companion in the presence of law enforcement officers*, even when coupled with being present in an area known for drugs, cannot create reasonable suspicion.

In contrast, in *State v. Butler*, the circumstances relevant to a determination of reasonable suspicion were:

- 1) [the] defendant was seen in the midst of a group of people congregated on a corner known as a “drug hole”;
- 2) [the officer] had had the corner under daily surveillance for several months;
- 3) [the officer] knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months;
- 4) [the officer] was aware of other arrests there as well;
- 5) [the] defendant was a stranger to the officers;
- 6) upon making eye contact with the uniformed officers, [the] defendant immediately moved away, behavior that is evidence of flight; and
- 7) it was [the officer’s] experience that people involved in drug traffic are often armed.

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331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992). The Court specifically distinguished the circumstances in *Butler* from those in *Brown* by noting “an additional circumstance — [the] defendant’s immediately leaving the corner and walking away from the officers *after making eye contact with them.*” *Id.* at 234, 415 S.E.2d at 722-23 (emphasis added). The Court construed these actions as “behavior that is evidence of *flight*[.]” *Id.* at 233, 415 S.E.2d at 722 (emphasis added). Thus, making eye contact with an officer before immediately turning and walking away in a manner which suggests an attempt to flee, when coupled with being present in an area known for drugs, *will* establish reasonable suspicion to sustain a stop.³

In *Watson*, upon the approach of law enforcement officers, the “defendant immediately attempted to enter the convenience store to avoid detention . . . [and] made evasive maneuvers to avoid detection, *i.e.*, putting the drugs in his mouth, attempting to swallow the drugs by drinking Coca-Cola and attempting to go into the store[.]” 119 N.C. App. at 398, 458 S.E.2d at 522 (italics added). The defendant’s attempt to swallow drugs, coupled with his presence in an area known for drugs, created reasonable suspicion for a stop. *Id.* In *State v. Sutton*, the defendant’s evasive action was “clinch[ing]” something in a waistband and posturing to conceal an item from a nearby officer. __ N.C. App. __, __, 754 S.E.2d 464, 471-72 (2014) (“While many of the facts in *Fleming* are the same or similar to this case, in *Fleming*, the defendant did not make any overt actions, and here [the] defendant did when he used his right hand to grab his waistband to clinch an item.”). Similarly, in *State v. Willis*, the circumstances supported a determination of reasonable suspicion when a defendant “left a suspected drug house just before [a] search warrant was executed[,] . . . [took] evasive action when he knew he was being followed[,] . . . [and] exhibited nervous behavior.” 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997). Thus, *overt, evasive behaviors* such as attempting to destroy contraband, behaving nervously while being

3. In contrast, simply observing law enforcement officers before walking away from them does *not* support a determination of reasonable suspicion. See *Fleming*, 106 N.C. App. at 170, 415 S.E.2d at 785 (finding no reasonable suspicion where the defendant and his companion “were just watching the group of officers standing on the street and talking” before walking away). Here, finding of fact 19 simply states that Defendant and his companion dispersed “upon spotting” Officer Brown in his marked patrol car. No finding of fact states that Defendant made eye contact with Officer Brown, and no testimony at the suppression hearing would have supported such a finding. Indeed, Officer Brown testified that, at the time he saw Defendant and his companion outside Kim’s Mart, it was “dark” and that, “as soon as *they observed my police vehicle*, you had [D]efendant . . . walk east, as if he was walking into the store. And then [his companion] actually walked west, away from the store.”

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followed, or concealing items from the view of officers, when coupled with being present in high crime areas, *can* create reasonable suspicion.

Here, the unchallenged findings of fact reveal that the following circumstances led to Officer Brown's stop of Defendant: (1) it was approximately 9:00 p.m.;⁴ (2) the area around Kim's Mart was known for illegal drug sales and had been the location of numerous drug-related arrests; (3) Defendant and a companion were standing together in front of Kim's Mart; (4) when the men saw Officer Brown's car, they began walking in opposite directions and Defendant entered Kim's Mart; (5) when Officer Brown turned his car around and returned, the two men were again standing together in front of Kim's Mart; and (6) when Officer Brown pulled into the store parking lot, Defendant and his companion again walked away from each other, with Defendant walking toward Officer Brown.

Thus, the totality of the relevant circumstances here consists of nothing more than (1) being in an area known for drug sales and (2) walking away from a companion in the presence of an officer twice. Defendant's presence with a companion at Kim's Mart, a location known for drug sales, cannot create reasonable suspicion to support a stop. *See Brown*, 443 U.S. at 52, 61 L. Ed. 2d at 365 ("There is no indication in the record that it was unusual for people to be in the alley. The fact that [the defendant] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [the defendant] himself was engaged in criminal conduct. In short, the [defendant's] activity was no different from the activity of other pedestrians in that neighborhood."). As discussed *supra*, that Defendant walked away from his companion after seeing Officer Brown, even in a known drug area, cannot create reasonable suspicion. *See Fleming*, 106 N.C. App. at 170, 415 S.E.2d at 785. Nothing in the findings of fact suggests that Defendant took any "evasive" action or engaged in behavior that could be construed as flight such as trying to swallow drugs, *see Watson*, 119 N.C. App. at 398, 458 S.E.2d at 522; concealing something from Officer Brown, *see*

4. The time of the stop, 9:00 p.m., cannot be considered a suspicious time to be at Kim's Mart, since that establishment was apparently open for business. *See, e.g., State v. Rinck*, 303 N.C. 551, 555-60, 280 S.E.2d 912, 916-20 (1981) (holding that circumstances supporting a reasonable basis for a stop included the defendants walking along a road at an "unusual hour" of approximately 1:35 a.m.); *State v. Blackstock*, 165 N.C. App. 50, 59, 598 S.E.2d 412, 418 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 283, 610 S.E.2d 208 (2005) (holding that reasonable suspicion existed where the defendant and a companion were observed loitering at a closed shopping center shortly before midnight, and, upon seeing law enforcement officers, hurriedly returned to their vehicle, which was parked out of general public view).

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Sutton, ___ N.C. App. at ___, 754 S.E.2d at 466; making eye contact with the officer and then immediately walking away, *see Butler*, 331 N.C. at 234, 415 S.E.2d at 722-23; or behaving nervously while being followed. *See Willis*, 125 N.C. App. at 542, 481 S.E.2d at 411.

On the contrary, Defendant's actions were anything but evasive or evidence of flight. Finding of fact 27 notes that, as Defendant "was walking away from Kim's Mart, he came within 5-10 feet of . . . Brown's patrol car." Here, as in *Fleming*, Officer Brown observed no overt act by Defendant nor any contact between Defendant and his companion that would suggest Defendant was engaged in, or about to engage in, criminal activity of any kind, including illegal drug activity. He simply saw two young men standing in front of a convenience store move away from each other twice. In sum, the United States Supreme Court, our own North Carolina Supreme Court, and previous panels of this Court have consistently held that these circumstances cannot create the reasonable suspicion required to permit police intrusion upon the liberty of our State's citizens.

Having determined that the initial investigatory stop was unlawful, we need not consider whether Defendant's consent to Officer Brown's search of his person was valid. *See State v. Guevara*, 349 N.C. 243, 249, 506 S.E.2d 711, 716 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999) (noting that evidence obtained as the result of illegal police conduct must be suppressed). The order denying Defendant's motion to suppress is reversed and the judgment entered upon Defendant's guilty plea is vacated.

REVERSED and VACATED.

Judge BRYANT concurs.

DILLON, Judge, dissenting.

I agree with the majority that the trial court's Finding of Fact 5—the only finding challenged by Defendant—is not supported by the evidence of record. However, because I believe that the remaining findings are sufficient to support the court's conclusion that Officer Brown possessed the reasonable suspicion requisite to justify an investigatory stop under the circumstances, I respectfully dissent.

As the majority points out, we have held that "the presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by

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[a] defendant[,] are sufficient to form reasonable suspicion to stop an individual.” *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995). Defendant does not dispute the trial court’s findings that Officer Brown was aware that Kim’s Mart—where the stop in question occurred—was a high-crime area, where numerous drug transactions had taken place and where Officer Brown had made a number of drug-related arrests. The sole issue, therefore, is whether the trial court’s remaining findings are sufficient to establish that Defendant engaged in “evasive actions” sufficient to give rise to reasonable suspicion.

This court has held, as the majority points out, that an individual’s action in merely walking away from one’s companion cannot be considered evasive action sufficient to form reasonable suspicion. *State v. Fleming*, 106 N.C. App. 165, 171, 415 S.E.2d 782, 785 (1992). However, as the majority also points out, our Supreme Court has held that there is reasonable suspicion to justify an investigatory stop where an individual who walks away from his companion in a high-crime area does so “*after making eye contact*” with a police officer. *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992) (emphasis added).

I believe that Defendant’s actions here were more evasive than those of the defendant in *Butler*; and, accordingly, I believe that we are compelled to conclude that Officer Brown conducted a valid stop under the circumstances. Unlike *Fleming*, where the defendant simply walked away from the police, here Defendant engaged in a *sequence of suspicious behaviors* upon observing Officer Brown’s patrol car. For instance, the trial court found that “Defendant . . . and [his companion] upon *spotting Officer Brown* in his marked patrol car stopped talking and dispersed [from the front of Kim’s Mart].” (Emphasis added.) This unchallenged finding is comparable to the key finding in *Butler* that the defendant “upon making eye contact with the uniformed officers . . . moved away.” *Butler*, 331 N.C. at 233, 415 S.E.2d at 722. Additionally, the trial court found that Officer Brown continued driving past Kim’s Mart and lost sight of Defendant and his companion before executing a U-turn and driving back toward Kim’s Mart, where he observed Defendant and his companion once again standing together. Finally, the trial court found that when Officer Brown pulled into the Kim’s Mart parking lot, Defendant and his companion *again* dispersed.

Any one of Defendant’s actions, standing alone, might not satisfy the requirements of the Fourth Amendment to conduct a *Terry* stop. However, I believe that Defendant’s actions, when considered in their totality, namely: (1) that Defendant and his companion split up upon spotting Officer Brown’s patrol car drive by Kim’s Mart the first time;

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(2) that Defendant and his companion reconvened once Officer Brown was out of site; and (3) that Defendant and his companion split up a second time upon observing Officer Brown driving back towards Kim's Mart— were certainly more evasive than the actions of the defendant in Butler. Accordingly, I believe that Officer Brown conducted a valid investigatory stop of Defendant in the present case, and I would affirm the trial court on this basis.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER AARON ROUSE

No. COA13-1104

Filed 20 May 2014

1. Appeal and Error—writ of certiorari—denial of counsel—granted

Defendant's petition for writ of certiorari was allowed and the Court of Appeals addressed the merits of defendant's argument that his constitutional right to assistance of counsel was violated when he was denied counsel at his resentencing hearing.

2. Constitutional Law—assistance of counsel—resentencing hearing

The trial court erred by denying defendant the assistance of counsel at his resentencing hearing. The trial court's judgments were vacated and the matter was remanded for resentencing.

Appeal by defendant from judgments entered 15 March 2013 by Judge Phyllis Gorham in Pender County Superior Court. Heard in the Court of Appeals 9 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for defendant-appellant.

ELMORE, Judge.

Christopher Aaron Rouse (defendant) appeals from two judgments entered after a resentencing hearing. Because the denial of defendant's

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right to counsel at resentencing constitutes structural error, we vacate the trial court's judgments and remand for further proceedings.

On 26 April 2011, defendant pled guilty to five counts of second-degree sexual exploitation of a minor committed in November of 2009, and to attaining habitual felon status. He was represented at this proceeding by appointed counsel Tonya Turner. As specified in the parties' plea arrangement, the trial court sentenced defendant in the mitigated range to two consecutive active prison terms of 77 to 102 months.

Defendant did not pursue an appeal. In 2012, however, he filed a motion for appropriate relief ("MAR") in superior court challenging, *inter alia*, the calculation of his prior record level ("Level"). The State conceded in response that, owing to an error on the sentencing worksheet, "[d]efendant was sentenced at Level III (5 points), but should have been sentenced at Level II (3 points)." Citing its authority to correct errors of law "on its own motion after entry of judgment[,]," *see* N.C. Gen. Stat. § 15A-1420(d) (2013), the trial court allowed defendant's MAR in part and ordered that his case "be calendared for resentencing without unnecessary delay."

At his resentencing hearing on 15 March 2013, defendant appeared "unrepresented" by counsel.¹ Upon inquiry by the prosecutor and the trial court, defendant acknowledged that he had prior misdemeanor convictions for possession of drug paraphernalia, misdemeanor larceny, and domestic criminal trespass, and that these convictions resulted in "three prior [record] points, placing [him] at level two for punishment purposes." Despite the absence of evidence or stipulation, the trial court found as a mitigating factor that defendant has a support system in the community. *See* N.C. Gen. Stat. § 15A-1340.16(e)(18) (2013).² After hearing from the parties, the trial court again sentenced defendant to two consecutive mitigated sentences of 77 to 102 months, as provided by his plea agreement. The judgments entered by the trial court at resentencing reflect defendant's Level II status based on three prior record points.

1. Although the resentencing judgments list the appointed counsel who represented defendant at his plea hearing, Tonya Turner, the transcript of the 15 March 2013 resentencing hearing clearly shows he was brought into court and required to proceed without the assistance of counsel.

2. Because the pertinent materials are absent from the record on appeal, it is unclear whether this mitigating factor was also found at defendant's original sentencing proceeding in April of 2011. We further note the record on appeal lacks the trial court's written findings of aggravating and mitigating factors at resentencing.

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Defendant filed a timely *pro se* notice of appeal on 22 March 2013. The trial court signed appellate entries on 15 April 2013, appointing the Appellate Defender to represent defendant on appeal. After filing the record in this Court, counsel filed a petition for writ of certiorari as an alternative basis for appellate review. While acknowledging certain technical deficiencies in defendant's notice of appeal, defense counsel asked this Court to review the judgments pursuant to N.C.R. App. P. 21(a)(1), in order to address "constitutional issues" including the violation of defendant's right to counsel at resentencing. The State opposed this Court's issuance of the writ, arguing that denial of counsel is not a cognizable claim on appeal from a guilty plea. *See* N.C. Gen. Stat. § 15A-1444(a1)-(a2), (e) (2013). We note, however, that the State did not move to dismiss defendant's appeal.

Having examined defendant's notice of appeal, we find its contents sufficient to satisfy the jurisdictional requirements of N.C.R. App. P. 4(b). Although defendant lists extraneous file numbers for charges dismissed under his plea agreement³, his notice of appeal also refers to the relevant file numbers—10 CRS 271, 50584-88—addressed in the resentencing judgments. *See* N.C.R. App. P. 4(b). "[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." *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006) (citations and quotations omitted). Furthermore, while the notice of appeal fails to designate the court to which his appeal is taken, as required by Rule 4(b), "defendant's intent to appeal is plain, and since this Court is the only court with jurisdiction to hear defendant's appeal, it can be fairly inferred defendant intended to appeal to this Court." *State v. Ragland*, ___ N.C. App. ___, ___, 739 S.E.2d 616, 620, *disc. review denied*, ___ N.C. ___, 747 S.E.2d 548 (2013).

[1] On appeal, defendant argues only that the failure to provide him with counsel at resentencing violated his constitutional and statutory rights under U.S. Const. amend. VI, N.C. Const. art. I, § 23, and N.C. Gen. Stat. § 7A-451(a)(1). The State responds that defendant has no

3. Any confusion regarding the file numbers resulted from the trial court's mistaken reference to 09 CRS 53285-89 at resentencing. Defendant called attention to the court's error and noted his objection. The court ultimately corrected its judgments on 27 March 2013 to reflect the correct file numbers in 10 CRS 50584-88. It appears defendant simply exercised due caution in listing both 09 CRS 52385-89 and 10 CRS 50584-88 in his notice of appeal filed 22 March 2013.

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right to appeal the denial of his right to counsel, inasmuch as his guilty plea limited his appellate rights to the issues set forth in N.C. Gen. Stat. § 15A-1444(a1)-(a2), (e) (2011).

As the State observes, the constitutional issue raised by defendant does not fall within his limited right of appeal under N.C. Gen. Stat. § 15A-1444. However, “it is permissible for this Court to review pursuant to a petition for writ of certiorari during the appeal period a claim that the procedural requirements of [G.S. Chapter 15A,] Article 58 [(Procedures Relating to Guilty Pleas in Superior Court)] were violated.” *State v. Rhodes*, 163 N.C. App. 191, 194, 592 S.E.2d 731, 733 (2004). Although Article 58 does not expressly address the appointment of counsel to assist an indigent defendant who pleads guilty in superior court, we believe a defendant’s constitutional right to representation by counsel is implicit in these statutory procedures. *See* N.C. Gen. Stat. §§ 15A-1012(a), 15A-1022(a)(5) (2013). We therefore allow defendant’s petition for writ of certiorari for the purpose of reviewing his claim.

[2] It is well-established that “sentencing is a critical stage of a criminal proceeding to which the right to . . . counsel applies.” *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E.2d 518, 521, *writ denied*, 314 N.C. 670, 337 S.E.2d 583 (1985). Accordingly, “[t]his Court has held that the threat of imprisonment at a resentencing hearing triggers an absolute right to counsel under the Sixth Amendment and N.C. Gen. Stat. § 7A-451. There is no question but that Defendant was subject to a threat of imprisonment at his resentencing hearing.” *State v. Boyd*, 205 N.C. App. 450, 454 & n.1, 697 S.E.2d 392, 394 & n.1 (2010) (citing *State v. Lambert*, 146 N.C. App. 360, 364-65, 553 S.E.2d 71, 75 (2001)). Indeed, defendant’s plea agreement required that he serve a minimum of twelve years in prison.

The complete denial of counsel is one of the six forms of structural error identified by the United States Supreme Court. *State v. Polke*, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)). “[A] defendant’s remedy for structural error is not dependant upon harmless error analysis; rather, such errors are reversible *per se*.” *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004). Therefore, we must vacate the trial court’s judgments and remand for resentencing. *Boyd*, at 456, 697 S.E.2d at 396 (“Defendant was deprived of his right to counsel at the resentencing hearing and is entitled to be resentenced.”).

Vacated and remanded for resentencing.

Judges McCULLOUGH and DAVIS concur.

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JENNIFER TYLL & DAVID TYLL, PLAINTIFFS

v.

JOEY BERRY, DEFENDANT

No. COA13-512

Filed 20 May 2014

1. Appeal and Error—notice of appeal—jurisdiction

The trial court did not err in a civil contempt proceeding by dismissing defendant's notice of appeal from a 50C no contact order. The court's jurisdiction over the case gave it authority to dismiss a filing in the case that defendant himself asserted was a nullity.

2. Appeal and Error—preservation of issues—failure to seek ruling at trial—failure to attend hearing—failure to move for continuance

Although defendant contended that the trial court erred in a civil contempt proceeding by failing to consider his request for appointed counsel, the Court of Appeals did not need to determine whether defendant was entitled to counsel since defendant failed to seek a ruling from the trial court on his request for counsel, failed to attend the contempt hearing where he could have had his motion heard, and failed to move to continue the matter.

3. Contempt—civil—findings of fact—sufficiency of evidence

The trial court did not err by finding in its civil contempt order that Sharon Tyll was a member of plaintiffs' family protected by a 50C no contact order, the 50C order prohibited defendant from simply "contacting" plaintiffs or their family, and defendant continued to harass and interfere with plaintiffs through electronic means following entry of the 50C order. The findings were supported by sufficient evidence.

4. Penalties, Fines, and Forfeitures—fine—civil contempt—amount

Although the trial court did not err in a civil contempt case by imposing a fine payable to plaintiffs, the amount was reversed and remanded to the trial court to make appropriate findings regarding defendant's present ability to pay the fine.

5. Appeal and Error—preservation of issues—failure to cite authority

Although defendant contended that the trial court exceeded its authority in a civil contempt proceeding by imposing additional

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restrictions on defendant's contact with plaintiffs and others in the order, this issue was abandoned under N.C. R. App. P. 28(b)(6) since defendant cited no authority in support of his argument.

Appeal by defendant from orders entered 18 December 2012 by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 7 November 2013.

No brief filed on behalf of plaintiffs-appellees.

Mary McCullers Reece for defendant-appellant (appeal from contempt order).

Joey Berry, pro se, defendant-appellant (appeal from order dismissing notice of appeal).

GEER, Judge.

Defendant Joey Berry appeals from the trial court's order holding him in contempt for violating a civil no-contact order entered pursuant to Chapter 50C of the General Statutes (the "50C order") and from the trial court's order dismissing his notice of appeal from the 50C order. With respect to the order dismissing defendant's notice of appeal from the 50C order, defendant contends that the paper he filed was not actually a notice of appeal, but only a "notice of intent to appeal," such that it was not untimely filed under the Rules of Appellate Procedure. We hold that whether the filing was a notice of appeal or a notice of intent to appeal, the trial court properly dismissed the filing as either untimely or a nullity.

With respect to the contempt order, defendant primarily argues that the trial court improperly ordered him to pay a fine to plaintiffs in order to purge himself of contempt. We hold that precedent authorizes a purge condition consisting of a fine payable to the complaining party. However, because the trial court failed to make findings that defendant had the present ability to comply with the purge condition, we reverse the fine and remand for further proceedings.

Facts

On 11 May 2012, plaintiffs Jennifer and David Tyll filed a verified complaint against defendant seeking a 50C order. David and Jennifer Tyll are husband and wife, and David Tyll is the brother of defendant's domestic partner, Michelle Willets.

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The complaint alleged that defendant was disrespectful to Jennifer Tyll, David Tyll, and Michelle Willets' mother, Sharon Tyll, and as a result, plaintiffs told Ms. Willets that defendant was not welcome at "upcoming family events." Defendant then sent angry emails to plaintiffs and demanded that they come to South Carolina where defendant and Ms. Willets lived. When plaintiffs refused, defendant sent an email to David Tyll's employer "suggesting horrible defamatory things." Defendant told David Tyll over the phone that the email to David Tyll's employer was the "tip of the ice-berg." An email from Ms. Willets to Sharon Tyll stated that defendant, when "forced into a fight," believed in "total war" and would not "back down . . . until [his] opponent [was] completely defeated."

On 23 May 2012, the trial court entered an order pursuant to N.C. Gen. Stat. § 50C-7 (2011) in which it found that plaintiffs "suffered unlawful conduct by the defendant" in that defendant sent "numerous emails to family members" and to David Tyll's employer that contained "references to war, death and never stopping, not following rules until your opponent is fully defeated," and that made "references to worst case scenarios." Based upon its findings, the court ordered defendant to, among other things, "not visit, assault, molest, or otherwise interfere with the plaintiffs or plaintiffs [sic] family." The order was effective until 23 May 2013.

On 7 September 2012, defendant, acting *pro se*, filed a document captioned "NOTICE OF APPEAL In Forma Pauperis." The filing stated that defendant "hereby gives notice of intent to appeal to the Court of Appeals of North Carolina" from the 50C order. The filing further stated: "The time for filing an appeal allowed by the NORTH CAROLINA RULES OF APPELLATE PROCEDURE having expired, the Defendant in this matter is preparing to petition the Honorable Court of Appeals of North Carolina for the writ of CERTIORARI in accordance with RULE 21 at the soonest point practical." Plaintiffs moved to dismiss defendant's notice of appeal under the Rules of Appellate Procedure, and the trial court entered an order dismissing defendant's notice of appeal as untimely on 18 December 2012.

On 11 October 2012, plaintiffs filed a verified motion to hold defendant in contempt of the 50C order. The motion alleged that defendant willfully violated the 50C order on 23 June 2012 by emailing plaintiffs' family member, Sharon Tyll. On 22 October 2012, defendant filed a "MOTION FOR PROCEEDING/APPEAL IN FORMA PAUPERIS," with an attached affidavit, requesting that the court "issue an order allowing the Defendant to proceed as an indigent" and appoint him counsel.

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It appears that the Orange County Clerk of Superior Court summarily denied the motion on 23 October 2012 by handwriting “Motion is denied” on the motion itself and signing and refileing the motion. On 29 October 2012, defendant timely appealed the denial of his motion to proceed as an indigent to the district court pursuant to N.C. Gen. Stat. §§ 7A-251(b) (2011) and 1-301.1(b) (2011).

On 2 November 2012, defendant filed a response to the contempt motion in which he admitted sending the email to Sharon Tyll, but disputed that the email was harassing and that the 50C order was specific enough to bar communication with Sharon Tyll. Defendant’s response also argued that the denial of his motion to proceed as an indigent, which forced him to file his response without the assistance of appointed counsel, violated his due process rights under the United States and North Carolina Constitutions.

Following an 11 December 2012 hearing on the contempt motion, at which defendant was not present, the trial court entered an order on 18 December 2012 holding defendant in contempt. The trial court found that defendant violated the 50C order by sending Sharon Tyll, a family member of plaintiffs, an email on 23 June 2012; that “the lawful purpose [of the 50C order] would still be served with compliance with same, i.e. the Defendant should continue to be restrained from any contact with Plaintiffs or their family”; and that “Defendant is in willful contempt of said order, as he has the ability to comply with same and refrain from sending the email.”

The court ordered that “[t]o purge himself of [the] contempt, Defendant shall pay to the Plaintiffs \$2500.00 on or before January 11, 2013” and that “each individual violation of the May 23, 2012 [order] shall result in at least another \$2500.00 purge for each violation.” In addition, the order “further restrain[ed]” defendant by (1) preventing defendant from contacting plaintiffs, their employers, or their family members, other than Michelle Willets, by any means; (2) preventing defendant from posting any information about plaintiffs or their family members, other than Michelle Willets, on the internet; and (3) ordering defendant to remove any internet posts about plaintiffs or their family members, other than Michelle Willets, within seven days from entry of the order. Defendant timely appealed the contempt order to this Court.

On 22 January 2013, defendant, still acting *pro se*, filed a second “MOTION FOR PROCEEDING/APPEAL IN FORMA PAUPERIS,” along with the same affidavit attached to his first motion to proceed as an indigent, again requesting that the trial court “issue an order allowing the

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Defendant to proceed as an indigent.” On 23 January 2013, the Orange County Clerk of Superior Court entered an order allowing defendant to proceed as an indigent “[i]n accordance with NCGS § 1-288 and solely for the purposes stated therein.”

Defendant filed a motion for appointment of appellate counsel on 11 April 2013. On 14 June 2013, the trial court entered an order appointing appellate counsel for defendant “with regards to any contempt motion or contempt orders.” On 29 July 2013, defendant filed a pro se brief addressing his appeal from the dismissal of his notice of appeal from the 50C order, and defendant’s appointed counsel filed a brief addressing his appeal from the contempt order.

I

[1] We first address defendant’s appeal from the dismissal of his “notice of appeal” from the 50C order. Defendant argues on appeal that the trial court erred in dismissing his notice of appeal as untimely under the Rules of Appellate Procedure because the filing was not actually a notice of appeal but was, rather, only a “notice of intent to appeal” that was not subject to the Rules of Appellate Procedure. Defendant further argues that since the trial court’s order dismissing the notice of appeal relied upon the Rules of Appellate Procedure as grounds for dismissing the appeal, the court was without jurisdiction to dismiss the filing that, he argues, did not create a valid appeal and was not, therefore, subject to the appellate rules.

Defendant’s “NOTICE OF APPEAL” purported to give “notice of intent to appeal” the 23 May 2012 50C order, but recognized that the time for taking an appeal had already expired. The notice, therefore, stated defendant was “preparing” to petition this Court for a writ of certiorari to review the 50C order.

Given that defendant’s filing was captioned a “NOTICE OF APPEAL” and stated that defendant gave “notice of intent to appeal to the Court of Appeals of North Carolina,” the trial court reasonably treated the filing as a notice of appeal. Assuming the filing was a notice of appeal, defendant admitted in the filing itself, and again recognizes on appeal, that the notice was untimely. *See* N.C.R. App. P. 3.

Although defendant argues that plaintiffs’ motion to dismiss the appeal was improper since it was not supported by affidavits or certified copies of docket entries showing defendant took untimely action as required by Rule 25 of the Rules of Appellate Procedure, we believe that Rule 25’s requirements for proof of the appellant’s untimely action

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is satisfied when, as here, the notice of appeal itself expressly states that the appeal is untimely. The trial court's dismissal of the notice as untimely was, under these circumstances, proper. *See* N.C.R. App. P. 25(a).

Assuming, as defendant contends, that the filing was not a notice of appeal but, rather, solely a "notice of intent to appeal" that did not itself constitute a valid appeal, the trial court nonetheless properly dismissed the filing as a nullity. Defendant has pointed to, and we have found, no authority allowing defendant to file a "notice of intent to appeal" in a civil case, and no authority limiting the trial court's jurisdiction to dismiss such an ineffectual filing.

Defendant's contention that the trial court lacked jurisdiction to dismiss the filing under the Rules of Appellate Procedure fails to recognize that the trial court already had jurisdiction over the case due to the proper filing of plaintiffs' complaint and the issuance of a summons. *See* N.C.R. Civ. P. 3(a) ("A civil action is commenced by filing a complaint with the court."). *See Estate of Livesay ex rel. Morley v. Livesay*, 219 N.C. App. 183, 185, 723 S.E.2d 772, 774 (2012) ("Without a proper complaint or summons under Rule 3 of the Rules of Civil Procedure, an action is not properly instituted and the court does not have jurisdiction."). The court's jurisdiction over the case gave it jurisdiction to dismiss a filing in the case that defendant himself asserts was a nullity. We, therefore, hold the trial court did not err in dismissing defendant's notice of appeal from the 50C order.

II

[2] Defendant next contends that the trial court erred in failing to consider defendant's request for appointed counsel. Defendant argues that the trial court's failure to address his request for counsel violated his due process rights under the United States and North Carolina Constitutions.

In civil contempt proceedings, the question whether an indigent, alleged contemnor is entitled to counsel under the Due Process Clause of the Fourteenth Amendment to the United States Constitution is a determination made on a case-by-case basis. *See Turner v. Rogers*, 564 U.S. 431, 448, 180 L. Ed. 2d 452, 466, 131 S. Ct. 2507, 2520 (2011) (holding that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)").

In contrast, in criminal contempt proceedings, the Sixth and Fourteenth Amendments to the United States Constitution generally

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“require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.” See *Scott v. Illinois*, 440 U.S. 367, 374, 59 L. Ed. 2d 383, 389, 99 S. Ct. 1158, 1162 (1979); *Turner*, 564 U.S. at 441, 180 L. Ed. 2d at 461-62, 131 S. Ct. at 2516 (observing that Sixth Amendment right of an indigent criminal defendant to appointed counsel “applies to *criminal contempt* proceedings (other than summary proceedings)”).

Given the differences between an indigent individual’s right to appointed counsel in a civil contempt proceeding and his right to counsel in a criminal contempt proceeding, we must initially determine whether the contempt proceeding and order in this case involved civil or criminal contempt. “Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.” *O’Briant v. O’Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985). “Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice.” *Id.*

Here, the contempt order did not specify whether the trial court held defendant in civil or criminal contempt. The order simply stated that the court was holding defendant in contempt based upon defendant’s willful violation of the 50C order.

N.C. Gen. Stat. § 50C-10 (2013) provides that “[a] knowing violation of an order entered pursuant to [Chapter 50C] is punishable as contempt of court.” Accordingly, all Chapter 50C orders “shall include the following notice, printed in conspicuous type: ‘A knowing violation of a civil no-contact order shall be punishable as contempt of court which may result in a fine or imprisonment.’” N.C. Gen. Stat. § 50C-5(c) (2013).

Civil contempt proceedings are initiated, among other ways, “by motion pursuant to G.S. 5A-23(a1).” N.C. Gen. Stat. § 5A-23(a) (2013). “Failure to comply with an order of a court is a continuing civil contempt as long as: (1) The order remains in force; (2) The purpose of the order may still be served by compliance with the order; (2a) The noncompliance by the person to whom the order is directed is willful; and (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.” N.C. Gen. Stat. § 5A-21(a) (2013).

Further, “[i]f civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the

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action which the contemnor must take to purge himself or herself of the contempt.” N.C. Gen. Stat. § 5A-23(e). With regard to punishment for civil contempt, N.C. Gen. Stat. § 5A-22(a) (2013) provides: “A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt.”

Here, plaintiffs initiated the contempt proceeding with a motion for contempt, pursuant to the procedures for civil contempt set out in N.C. Gen. Stat. § 5A-23(a1). The trial court’s order likewise indicates the court was holding defendant in civil contempt, as the order included each of the requisite findings for civil contempt specified in N.C. Gen. Stat. § 5A-21(a) and expressed the court’s intent to include a “purge” clause pursuant to N.C. Gen. Stat. § 5A-23(e).

At the contempt hearing, the trial court’s statements indicate it was rendering a civil contempt order in an effort to force defendant to comply with the 50C order:

[PLAINTIFF’S COUNSEL:] I do want the Court to be aware that there have been other emails sent since that one, and we are now seeking some different relief. We’re asking you to consider to bar him from any Internet communication about the Tyll family, to or from them or about them, in any form including a website.

So, we want him to stay off the Internet to or from any family member of the Tyll’s, and we want him to stop posting about this family. We don’t want any other contact, through telephone or personal, and that’s all ready [sic] been ordered, and we are asking you [sic] consider to allow an order against him, a monetary order of \$2,500.

THE COURT: *Well, I think that’s what’s gonna [sic] be necessary because he’s obviously -- has no boundaries.*

Okay. The Court will find him in contempt, [indecipherable], enter a purge amount – a bond amount in the amount of \$2,500 to be doubled each – for each violation.

(Emphasis added.)

Finally, construing the order as an order for civil contempt is consistent with N.C. Gen. Stat. § 50C-10’s provision for contempt sanctions for a violation of a 50C order and N.C. Gen. Stat. § 5A-25 (2013) general rule that “[w]henever the laws of North Carolina call for proceedings as

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for contempt, the proceedings are those for civil contempt” The trial court’s order was, therefore, an order for civil contempt. *Cf. Reynolds v. Reynolds*, 147 N.C. App. 566, 576-81, 557 S.E.2d 126, 132-35 (2001) (John, J., dissenting) (treating order as one for criminal contempt based on, among other factors, lack of purge condition in sanction imposed, trial court’s characterization of contempt as criminal and not civil, and trial court’s apparent desire to punish contemnor as shown by trial court’s statements at hearing and nature of sanctions imposed), *rev’d per curiam sub nom. Reynolds v. Reynolds (now Flynn) for reasons stated in the dissent*, 356 N.C. 287, 569 S.E.2d 645 (2002).

Turning to defendant’s arguments on appeal, after plaintiffs filed their contempt motion, defendant moved the trial court to be allowed to proceed as an indigent and attached an affidavit of indigency to his motion. The clerk of superior court summarily denied defendant’s motion, and defendant appealed that denial to the district court judge. Defendant then filed a response to plaintiffs’ contempt motion that again declared defendant’s indigency and asserted as an “ADDITIONAL DEFENSE[]” that the denial of defendant’s motion to proceed as an indigent, forcing defendant to respond to the contempt motion without appointed counsel, violated defendant’s state and federal constitutional rights to due process.

N.C. Gen. Stat. § 7A-451(a)(1) (2013) provides that “[a]n indigent person is entitled to services of counsel in . . . [a]ny case in which imprisonment, or a fine of five hundred dollars (\$500.00), or more, is likely to be adjudged.” “The clerk of superior court is authorized to make a determination of indigency and entitlement to counsel, as authorized by this Article.” N.C. Gen. Stat. § 7A-452(c)(1) (2013). However, a “judge of superior or district court having authority to determine entitlement to counsel in a particular case . . . may, if he finds it appropriate, change or modify the determination made by the clerk” N.C. Gen. Stat. § 7A-452(c)(2).

Given defendant’s appeal to the district court judge from the denial of his motion to proceed as an indigent, and his separate request for appointment of counsel in his response to the contempt motion, the trial court in this case had the authority to modify the clerk’s denial of defendant’s motion to proceed as an indigent, to find defendant indigent, and to appoint defendant counsel. However, we need not determine whether defendant was entitled to counsel in this civil contempt proceeding since defendant failed to seek a ruling from the trial court on his request for counsel, failed to attend the contempt hearing where he could have had his motion heard, and failed to move to continue the matter.

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Our Supreme Court has held that “a lawyer cannot properly represent a client with whom he has no contact.” *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). This is so because “‘North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency,’ and ‘[t]wo factors are essential in establishing an agency relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent.’” *Id.* at 577, 515 S.E.2d at 444 (quoting *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532-33, 463 S.E.2d 397, 400 (1995)).

Here, the trial court could not appoint counsel to represent defendant at the hearing since defendant was not present and could neither authorize a particular attorney to be his agent nor exercise control over that attorney. *See id.* at 575, 578, 515 S.E.2d at 443, 445 (holding law firm hired by insurer could not represent defendant insured who had absconded since insured had never authorized firm to represent him). Since defendant also failed to move to continue the matter, there was no relief requested of the court pursuant to which defendant could be appointed counsel whose representation he could authorize.

In addition, defendant’s argument is not properly preserved for appeal since, although defendant appealed the denial of his motion to proceed as an indigent and requested the appointment of counsel in his response to the contempt motion, defendant failed to attend the contempt hearing and, therefore, failed to obtain a ruling on his appeal and request for counsel after the initial denial of his motion to proceed as an indigent. *See* N.C.R. App. P. 10(a)(1) (“In order to preserve an issue for appellate review . . . [i]t is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.”); *Gilreath v. N.C. Dep’t of Health & Human Servs.*, 177 N.C. App. 499, 501, 629 S.E.2d 293, 294 (holding plaintiff failed to preserve argument that court erred in failing to grant plaintiff’s motion to strike paragraphs from affidavits since plaintiff never obtained ruling on motion), *aff’d per curiam*, 361 N.C. 109, 637 S.E.2d 537 (2006). We, therefore, hold that the trial court did not violate defendant’s due process rights by conducting the contempt hearing, in defendant’s absence, and holding defendant in contempt without further considering defendant’s request for appointed counsel.

III

[3] Defendant additionally argues that the trial court erred in finding in its contempt order that (1) Sharon Tyll was a member of plaintiffs’ family protected by the 50C order; (2) the 50C order prohibited defendant

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from simply “contacting” plaintiffs or their family; and (3) defendant continued to harass and interfere with plaintiffs through electronic means following entry of the 50C order. “The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997).

The 50C order ordered defendant to, among other things, “not visit, assault, molest, or otherwise interfere with the plaintiffs or plaintiffs [sic] family.” The trial court found that “Sharon Tyll is a family member of the Defendants [sic] who is protected from harassment and interference by the May 23, 2012 Order.” Sharon Tyll testified at the hearing that she was plaintiff David Tyll’s mother and considered herself his family member.

Defendant, however, argues that he was in a relationship with Michelle Willets, David Tyll’s sister, throughout the life of this case and that a reading of the 50C order that prohibited certain contact with Sharon Tyll would be unreasonable because such an interpretation could just as easily prohibit defendant’s contact with Ms. Willets. Defendant’s argument fails to recognize that the substance of the email he sent to Sharon Tyll, for which defendant was found in contempt, demonstrates defendant understood Sharon Tyll to be a member of plaintiffs’ family covered by the relevant provision of the 50C order. Defendant wrote: “Please stop harassing us. *You, David and Jenny have gotten a court order severing Michelle (and me) from your family for at least eleven more months.* Your attempts to call us are torturous to Michelle. Under no circumstance is any form of communication welcome to either Michelle or me.” (Emphasis added.) As an attachment to defendant’s response to plaintiffs’ contempt motion, this email was evidence before the trial court that supported the court’s finding that Sharon Tyll was considered part of plaintiffs’ family for purposes of the 50C order.

Defendant further challenges the trial court’s finding that the 50C order prohibited defendant “from *contacting*, visiting, molesting, or otherwise interfering with the Plaintiffs or the Plaintiff’s [sic] family.” (Emphasis added.) Defendant asserts that the relevant provision of the 50C order only ordered him to “not visit, assault, molest, or otherwise interfere with the plaintiffs or plaintiffs [sic] family.” He argues that he was, therefore, not barred from merely “contacting” plaintiffs’ family.

Even assuming that the trial court’s description of the underlying order was not completely consistent with the actual terms of the order,

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that specific finding, describing the underlying order, was not necessary to support the trial court's conclusion that defendant wilfully violated the 50C order by emailing Sharon Tyll. Defendant does not challenge the court's finding that "Defendant violated the Order on June 23, 2012, by sending an email from [defendant's email address] to [Sharon Tyll's email address]. That email was received by Sharon Tyll and it bothered her."

This unchallenged finding regarding Sharon Tyll being "bothered" by the email falls within the undisputed term of the 50C order that defendant not "interfere with" plaintiffs' family. Because the finding as to "contacting" was unnecessary to the trial court's conclusions, any error did not prejudice defendant. *See Blalock Elec. Co. v. Grassy Creek Dev. Corp.*, 99 N.C. App. 440, 445, 393 S.E.2d 354, 357 (1990) ("[A]ny error with regard to this finding would not affect the court's judgment where other findings supported by competent evidence would be sufficient to support the judgment.").

Defendant also challenges the finding that "Defendant has continued to harass and interfere with the Plaintiffs through electronic means since the entry of the May 23, 2012 restraining order." Having already observed that the trial court was presented with evidence of the email sent from defendant to Sharon Tyll, we note that in that email, defendant told plaintiff David Tyll's mother, Sharon Tyll, to stop "harassing" defendant, and stated that Sharon Tyll's "attempts to call" her daughter, Michelle Willets, were "torturous." Defendant further told Sharon Tyll that "[u]nder no circumstance" was "any form of communication welcome to" her daughter. Sharon Tyll testified that the email continued to bother her.

The email also specifically referred to both plaintiffs, by name, and Sharon Tyll as "hav[ing] gotten a court order severing Michelle (and [defendant]) from your family for at least eleven more months." This evidence permitted a reasonable inference that plaintiff David Tyll, Sharon Tyll's son, would feel "harass[ed]" and "interfere[d] with" by defendant's email to his mother, sent after entry of the 50C order sought by plaintiffs to prevent just such communications. We, therefore, hold that the court's finding was supported by competent evidence.

IV

[4] Defendant's final argument is that the trial court erred in imposing sanctions for civil contempt that exceeded the trial court's statutory contempt powers. First, defendant contends that the court erred in requiring defendant to pay a "purge" amount of \$2,500.00 since that sanction actually operated as a fine or monetary award against defendant, and,

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he asserts, there is no legal basis for imposing a fine or monetary award against a civil contemnor.

The contempt order in this case ordered that “[t]o purge himself of [the] contempt, Defendant shall pay to the Plaintiffs \$2500.00 on or before January 11, 2013.” The order further provided, with respect to any future violations of the 50C order, that “each individual violation of the May 23, 2012 [order] shall result in at least another \$2500.00 purge for each violation.”

As observed by defendant, N.C. Gen. Stat. § 5A-21(b) provides that “[a] person who is found in civil contempt may be imprisoned as long as the civil contempt continues.” However, defendant’s argument that there are no further statutorily permitted sanctions for civil contempt fails to recognize that (1) N.C. Gen. Stat. § 50C-10 provides that “[a] knowing violation of an order entered pursuant to [Chapter 50C] is punishable as contempt of court”; (2) N.C. Gen. Stat. § 5A-25 provides that “[w]henver the laws of North Carolina call for proceedings as for contempt, the proceedings are those for civil contempt”; and (3) N.C. Gen. Stat. § 50C-5(c) provides that all Chapter 50C no-contact orders “shall include the following notice, printed in conspicuous type: ‘A knowing violation of a civil no-contact order shall be punishable as contempt of court which *may result in a fine* or imprisonment.’” (Emphasis added.) We believe that these statutes, read together, support the inference that fines are statutorily permitted sanctions for civil contempt proceedings based upon violations of Chapter 50C no-contact orders.

Our Supreme Court has indicated that fines are appropriate sanctions for civil contempt in North Carolina:

The purpose of civil contempt is not to punish; rather, its purpose is to use the court’s power to impose *fines* or imprisonment as a method of coercing the defendant to comply with an order of the court. . . . Accordingly, defendant in a civil contempt action will be *fined* or incarcerated only after a determination is made that defendant is capable of complying with the order of the court. The imprisonment or *fine* is lifted as soon as defendant decides to comply with the order of the court, or when it becomes apparent that compliance with the order is no longer feasible. . . . In the recently enacted contempt statute, civil contempt is carefully defined along these lines. G.S. 5A-21, *et seq.* and Official Commentary.

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Jolly v. Wright, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) (emphasis added), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993). *See also McBride*, 334 N.C. at 130, 431 S.E.2d at 18 (observing that “a defendant in a civil contempt action should not be fined or incarcerated for failing to comply with a court order without a determination by the trial court that the defendant is presently capable of complying”).

This Court has similarly referred to the propriety of a fine as a sanction for civil contempt: “A defendant in a civil contempt action will be fined or incarcerated only after a determination is made that the defendant is capable of complying with the order of the court.” *Oakley v. Oakley*, 165 N.C. App. 859, 864, 599 S.E.2d 925, 929 (2004) (quoting *Reece v. Reece*, 58 N.C. App. 404, 406–07, 293 S.E.2d 662, 663–64 (1982)).

Defendant further contends, however, that even if a fine is a permissible sanction for civil contempt, this Court has held that a court may not award damages or costs to a private party in a civil contempt proceeding. In support of his argument, defendant cites *Baxley v. Jackson*, 179 N.C. App. 635, 634 S.E.2d 905 (2006) and *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990). *See Baxley*, 179 N.C. App. at 640, 634 S.E.2d at 908 (“Because contempt is considered an offense against the State, rather than an individual party, ‘damages may not be awarded to a private party because of any contempt[.]’” (quoting *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 102, 370 S.E.2d 431, 434 (1988))); *Green*, 96 N.C. App. at 659, 386 S.E.2d at 760 (“[C]ontempt proceedings are *sui generis* and criminal in nature. Although labeled “civil” contempt, a proceeding as for contempt is by no means a civil action or proceeding to which G.S. 6-18 (when costs shall be allowed to plaintiff as a matter of course), or G.S. 6-20 (allowance of costs in discretion of court) would apply.” (quoting *United Artists Records, Inc. v. E. Tape Corp.*, 18 N.C. App. 183, 188, 196 S.E.2d 598, 601 (1973))).

“The word ‘damages’ is defined as compensation which the law awards for an injury[;] ‘injury’ meaning a wrongful act which causes loss or harm to another.” *Cherry v. Gilliam*, 195 N.C. 233, 235, 141 S.E. 594, 595 (1928). *See also Black’s Law Dictionary* 445 (9th ed. 2009) (defining “damages” as “[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury”). “[C]ompensation,” in turn, has been defined as “[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another.” *Id.* at 322. “In theory, compensation makes the injured person whole.” *Id.*

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While damages or costs may not be awarded to plaintiffs in a civil contempt proceeding, this Court has expressly acknowledged that a person found in civil contempt may be required to pay a fine to the opposing party. In *Bishop v. Bishop*, 90 N.C. App. 499, 505, 369 S.E.2d 106, 109 (1988), this Court looked to the character of the relief ordered in a contempt proceeding to determine whether that proceeding involved civil or criminal contempt. This Court held that civil contempt could involve a monetary payment “if the monies are either paid to the complainant or defendant can avoid payment to the court by performing an act required by the court.” *Id.* The Court specifically held that civil contempt can involve a fine “when it is paid to the complainant” or if payable to the court “when the defendant can avoid paying the fine simply by performing the affirmative act required by the court’s order.” *Id.* at 504, 369 S.E.2d at 108-09 (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632, 99 L. Ed. 2d 721, 731, 108 S. Ct. 1423, 1429 (1988)).

In this case, there is no indication in the record that the award of \$2,500.00 payable to plaintiffs for defendant’s contempt, or the possibility of future payments of “at least another \$2500.00” for future violations of the 50C order, were intended to compensate plaintiffs for loss or injury from defendant’s contempt or to pay the costs of the action incurred by plaintiffs. The payments were denominated “purge” conditions in the order, indicating the court intended the payments to coerce defendant into compliance with the 50C order rather than to compensate plaintiffs for defendant’s contempt. See *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999) (“A court order holding a person in civil contempt must specify how the person may purge himself or herself of the contempt. The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order.” (internal citations omitted)).

Further, at the hearing, in response to plaintiffs’ counsel’s request for a “monetary order of \$2,500” in response to defendant’s contempt, the trial court stated: “Well, I think that’s what’s gonna [sic] be necessary because he’s obviously—has no boundaries. Okay. The Court will find him in contempt, [indecipherable], enter a purge amount—a bond amount in the amount of \$2,500 to be doubled each—for each violation.” The foregoing indicates that, in this case, the court entered a monetary award for civil contempt payable to plaintiffs in order to coerce defendant into compliance with the 50C order and not in order to compensate plaintiffs for defendant’s contempt. The trial court, therefore, did not err in ordering defendant to pay a fine to plaintiffs.

Defendant further argues that the sanction imposed for civil contempt was invalid because there was no effective purge condition. To hold

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a person in civil contempt, “the judicial official must enter an order . . . specifying the action which the contemnor must take to purge himself or herself of the contempt.” N.C. Gen. Stat. § 5A-23(e). Here, the trial court ordered that in order “[t]o purge himself of [the] contempt, Defendant shall pay to the Plaintiffs \$2500.00 on or before January 11, 2013.”

Defendant contends that although “this Court has considered cases involving monetary awards payable on findings of civil contempt, the instances of such awards are limited to those cases where the underlying order imposed an obligation of payment, as in a child support case.” He then argues that “[i]n the case of the child support obligor, the payment of arrears is partial compliance with the order being enforced. Thus, the obligor may avoid incarceration by making payment in compliance with the underlying child support order.”

However, our courts have also held that requiring a contemnor to pay attorneys’ fees in order to purge himself of contempt may be an appropriate purge condition. These cases do not involve payments that would have been required by the underlying order that the contemnor violated. *See, e.g., Eakes v. Eakes*, 194 N.C. App. 303, 312, 669 S.E.2d 891, 897 (2008) (“North Carolina courts have held that the contempt power of the trial court includes the authority to require the payment of reasonable attorney’s fees to opposing counsel as a condition to being purged of contempt for failure to comply with a child support order.”); *Middleton v. Middleton*, 159 N.C. App. 224, 227, 583 S.E.2d 48, 49-50 (2003) (“This Court has held that the contempt power of the district court includes the authority to award attorney fees as a condition of purging contempt for failure to comply with an order.”). *See also Hartsell v. Hartsell*, 99 N.C. App. 380, 392, 393 S.E.2d 570, 577 (1990) (observing that when party has been held in contempt for violating order requiring transfer of property, trial court had authority to order contemnor to transfer property or its present value as condition of purging contempt), *aff’d per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

We see no basis for distinguishing a fine payable to the moving party from these types of payments. Therefore, the trial court included a proper purge condition when it required defendant to pay the fine to plaintiffs in order to purge himself of contempt.

Defendant next argues that the contempt order’s \$2,500.00 payments for present and any future violations of the 50C order were invalid because the trial court made no findings concerning defendant’s ability to pay, at the time of the contempt hearing or at any point in the future, respectively, the amount of \$2,500.00. We agree.

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This Court has held that North Carolina's civil contempt statutes "require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt." *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985). We see no reason why a monetary sanction should be treated differently. *See Jolly*, 300 N.C. at 92, 265 S.E.2d at 142 ("[D]efendant in a civil contempt action will be fined or incarcerated only after a determination is made that defendant is capable of complying with the order of the court.").

The contempt order in this case contains no findings that defendant, at the time of the contempt hearing or otherwise, had the ability to pay a \$2,500.00 award to plaintiffs. In fact, the only evidence in the record regarding defendant's ability to pay is defendant's affidavit of indigency attached to his two motions to proceed as indigent. That affidavit stated that defendant and his partner, Ms. Willets, each have no direct source of income and receive room and board in exchange for caring for defendant's mother. The affidavit further stated defendant owned no real property; defendant owned some personal property but any requirement to liquidate that property would "substantially affect[]" defendant's ability to care for his mother; and the total value of defendant's "cash" was "less than \$2500.00." The trial court, therefore, erred in requiring the monetary payments without first finding defendant was presently able to comply with the \$2,500.00 fine imposed as a result of defendant's past contempt or would be able to comply in the future with any \$2,500.00 fines imposed as a result of any further violations of the 50C order.

[5] Finally, defendant contends that the trial court exceeded its authority in this contempt proceeding by imposing additional restrictions on defendant's contact with plaintiffs and others in the contempt order since defendant was not given notice of any request for sanctions beyond those allowed for contempt or of a hearing to modify the 50C order. We do not agree.

The 23 May 2012 50C order ordered defendant to "not visit, assault, molest, or otherwise interfere with the plaintiffs or plaintiffs [sic] family"; to "cease harassment of the plaintiff"; to "not abuse or injure the plaintiff"; to "not contact the plaintiffs by telephone, written communication, or electronic means"; and to "not enter or remain present at the plaintiff's residence . . . [or] place of employment."

The contempt order contained the following provisions in the decretal portion of the order:

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4. The Court hereby further restrains the Defendant from the following acts:
 - a) Defendant, Joey Berry, shall not contact by phone, internet, mail or any other means any employer or family member of Jennifer and David Tyll, except Michelle Willets, directly or indirectly or through a third party, even by using a pseudonym or by acting as power of attorney or attorney in fact for any other person.
 - b) Defendant, Joey Berry, shall not post or allow to be posted any information of any kind whatsoever referring to, referencing, or stating the names of the Plaintiffs or any member of their family, except Michelle Willets, on the internet, on any blog, forum, in any email, in any electronic newspaper or magazine, on any social website such as Facebook, using his name or any pseudonym.
 - c) Within 7 days from the date of entry of this order, the Defendant shall remove from any internet posting, web sites and/or postings, blogs, social media, and other communications not limited to the internet, if these communications relate to or reference the Plaintiffs or the names of the Plaintiffs or any of their family members other than Michelle Willets, even if the communication, posting, blog, email, ect. [sic], was published using a pseudonym or by acting as power of attorney or attorney in fact for any other person.

We initially note that these provisions do not necessarily place any further restrictions on defendant beyond those set out in the original 50C order. They may be viewed as simply specifying the behaviors that reasonable people would understand to be subsumed within the terms of the original order – a clarification that the trial court likely viewed as necessary given defendant's apparent intention to try to avoid compliance with the 50C order by a restrictive reading of the order.

Defendant cites no authority in support of his argument that the trial court erred by including decretal paragraph 4. Therefore, he has not properly presented this issue for our review, and we do not address

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it. *See Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, __ N.C. App. __, __, 746 S.E.2d 13, 18 (2013) (“With regard to her substantive due process claim, plaintiff, in her brief, fails to cite any legal authority in support of her contention on this issue. We, therefore, deem this argument abandoned on appeal pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.”).

Conclusion

In sum, we affirm the trial court’s order dismissing defendant’s notice of appeal from the 50C order. We hold that the court did not violate defendant’s right to due process by not further considering defendant’s request for appointed counsel and that the challenged findings of fact in the contempt order were either supported by the evidence or unnecessary to support the court’s conclusion that defendant was in contempt of the 50C order. We also affirm the trial court’s decision to impose a fine payable to plaintiffs, but we reverse as to the amount and remand for the trial court to make appropriate findings regarding defendant’s present ability to pay the fine.

Affirmed in part; reversed and remanded in part.

Judges STEPHENS and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 MAY 2014)

ABDELAZIZ v. ASMAR No. 13-1424	Mecklenburg (11CVS19947)	No Error
AMOS v. MOORE No. 13-963	Forsyth (12CVS4964)	Reversed
BEST v. GALLUP No. 13-1148	Wake (10CVD1893)	Affirmed in Part and Reversed in Part
CHURCH v. DECKER No. 13-771	Caldwell (01CVD1391)	Reversed and Remanded
FIA CARD SERVS., N.A. v. CAVINESS No. 13-1442	Wake (11CVD16592)	Affirmed
HAUGH v. NATIONWIDE MUT. FIRE INS. CO. No. 13-768	Mecklenburg (10CVS19441)	AFFIRMED in part, MODIFIED in part.
IN RE A.R.S. No. 13-1300	New Hanover (11JT73-75)	Affirmed
IN RE E.I.O. No. 13-1341	Mitchell (13JT07)	Reversed and Remanded
IN RE J.M. No. 13-1154	Johnston (12JA135-136)	Affirmed
IN RE JEMSEK No. 13-801	Wake (12CVS9321)	Affirmed
IN RE K.K. No. 13-1385	Swain (12JA22-23)	Affirmed
IN RE K.M.C. No. 13-1414	Randolph (10JA34) (13JA5)	Affirmed in part; reversed in part
IN RE L.B.B. No. 13-1260	Harnett (13J29)	Affirmed
IN RE M.A.H. No. 13-1379	Guilford (10JT555)	Affirmed
IN RE S.M.W. No. 13-1362	Pasquotank (13JT17)	Affirmed

IN RE STANBACK No. 13-1295	Durham (13CVS3898)	Dismissed
KING v. ORR No. 13-621	Pender (05SP146) (07CVS617)	Dismissed
KING v. PENDER CNTY. No. 13-618	Pender (12CVS794)	Dismissed
LCA DEV., LLC v. WMS MGMT. GRP., LLC No. 13-1467	Pitt (12CVS3376)	Dismissed
MORALES v. GARCIA No. 13-983	Cabarrus (12CVD1061)	Affirmed in part; reversed and remanded in part
N.C. STATE BAR v. BERMAN No. 13-1249	N.C. State Bar (12DHC31)	Affirmed
NELSON v. ALLIANCE HOSPITALITY MGMT., LLC No. 13-1325	Wake (11CVS3217)	Dismissed
ROBERSON v. ROBERSON No. 13-1196	Vance (12CVD1019) (12CVD809)	Affirmed
STATE v. ADAMS No. 13-1202	Johnston (12CRS50894)	No Error
STATE v. BROWNING No. 13-892	Franklin (12CRS50024-25)	Reversed and Remanded
STATE v. CASH No. 13-935	Onslow (12CRS50104) (12CRS50106) (12CRS50120-22) (12CRS50124)	No error in part; reversed in part and remanded
STATE v. CHAPIN No. 13-897	Wake (10CRS201603-604)	No Prejudicial Error
STATE v. CRADDOCK No. 13-997	Rockingham (11CRS50150) (11CRS817) (13CRS354)	No Error
STATE v. DAVIS No. 13-1110	Mecklenburg (12CRS225761) (12CRS230370) (12CRS44899)	No Error

STATE v. EDMONDS No. 13-1219	Buncombe (11CRS64718)	No Error
STATE v. GASPAR No. 13-970	Wayne (11CRS55331) (11CRS55332)	No prejudicial error
STATE v. GILLIS No. 13-1203	Cabarrus (09CRS3474)	No Error
STATE v. GRAVES No. 13-1299	Guilford (12CRS78766-67)	No Error in Part; Vacated in Part; Remanded for resentencing.
STATE v. KAPEC No. 13-1236	New Hanover (12CRS52513)	New Trial
STATE v. LEMON No. 13-1144	Forsyth (11CRS57557)	No Error
STATE v. LINK No. 13-1171	Person (12CRS1727-29)	Reversed and Remanded
STATE v. McMILLAN No. 13-1045	Hoke (12CRS50141) (12CRS895) (13CRS229)	No Error
STATE v. MILLER No. 13-1368	Wake (11CRS11876) (11CRS221347-50)	Affirmed
STATE v. MORGAN No. 13-1227	Union (09CRS55490-94) (09CRS55496-98) (09CRS55500-01)	Affirmed
STATE v. PITTMAN No. 13-765	Halifax (11CRS54905-06) (11CRS54968)	No Error
STATE v. POLK No. 13-849	Rowan (11CRS51259-61) (11CRS55416)	No Error
STATE v. REYNOSA No. 13-1160	Graham (12CRS360-361) (12CRS50484)	No Error

STATE v. ROBERTS No. 13-1111	Brunswick (07CRS52264-79)	Affirmed
STATE v. SEXTON No. 13-1086	Wake (12CRS213765)	No Error
STATE v. SIMPSON No. 13-776	Guilford (10CRS72489)	No Error
STATE v. SPENCER No. 13-1158	Tyrrell (11CRS295-296)	Dismissed
STATE v. TURNER No. 13-1157	Duplin (08CRS51563) (08CRS51567)	Affirmed
STATE v. WATTS No. 13-1145	New Hanover (11CRS54439)	Dismissed
STATE v. WILSON No. 13-969	Cleveland (11CRS1130-31) (11CRS1186)	Affirmed
STATE v. WOOD No. 13-1258	Rutherford (12CRS294)	Affirmed in part; remanded in part.
TRICEBOCK v. KRENTZ No. 13-852	Mecklenburg (11CVD1704)	Affirmed in part; reversed and remanded in part

CAN AM S., LLC v. STATE OF N.C.

[234 N.C. App. 119 (2014)]

CAN AM SOUTH, LLC, PLAINTIFF

v.

THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, AND THE NORTH CAROLINA DEPARTMENT
OF ADMINISTRATION, DEFENDANTS

No. COA13-1240

Filed 3 June 2014

1. Appeal and Error—interlocutory orders and appeals—sovereign immunity—personal jurisdiction

Although defendants' appeal from the trial court's order denying their N.C.G.S. § 1A-1, Rule 12(b)(1) motion to dismiss based on sovereign immunity was dismissed because it did not affect a substantial right, their Rule 12(b)(2) motion to dismiss based on sovereign immunity was allowed because it constituted an adverse ruling on personal jurisdiction. Defendants' appeal from the trial court's order denying their Rule 12(b)(6) motion to dismiss based on the argument that plaintiff failed to adequately plead an actual controversy in the declaratory judgment claim was dismissed because it involved neither a substantial right nor an adverse ruling as to personal jurisdiction.

2. Immunity—sovereign immunity—waiver—lease agreements—breach of contract—declaratory judgment

The trial court did not err by denying defendants' motion to dismiss both the breach of contract claim and the claim for declaratory relief. Plaintiff sufficiently pled waiver of defendants' sovereign immunity. Defendants impliedly waived their sovereign immunity by entering into the lease agreements with plaintiff. The State waives its sovereign immunity when it enters into a contract with a private party, and not when it engages in conduct that may or may not constitute a breach.

Appeal by defendants from order entered 8 May 2013 by Senior Resident Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 5 March 2014.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Walter L. Tippett, Jr. and S. Wilson Quick, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, Sr. and Assistant Attorney General G. Mark Teague, for defendants-appellants.

CAN AM S., LLC v. STATE OF N.C.

[234 N.C. App. 119 (2014)]

HUNTER, Robert C., Judge.

The State of North Carolina (“the State”), the North Carolina Department of Health and Human Services (“DHHS”), and the North Carolina Department of Administration (collectively “defendants”) appeal from an order denying their motion to dismiss. Can Am South, LLC (“plaintiff”) filed suit against defendants for breach of contract and declaratory judgment. Defendants argue that the trial court erred by: (1) denying defendants’ motion to dismiss plaintiff’s claim for a declaratory judgment because defendants did not waive sovereign immunity, or in the alternative, the complaint fails to allege the existence of an actual controversy; and (2) denying defendants’ motion to dismiss because defendants did not breach any contract with plaintiff, thus foreclosing waiver of sovereign immunity. Defendants also argue that the availability of funds clause in the lease agreements is enforceable and its enforcement does not constitute a breach of contract.

After careful review, we dismiss the appeal in part and affirm the trial court’s order denying defendants’ Rule 12(b)(2) motion to dismiss on the ground of sovereign immunity.

Background

The facts of this case are undisputed. Plaintiff is a limited liability company existing under the laws of North Carolina but operating its principal place of business in New York. Plaintiff owns a converted commercial office and storage facility in Raleigh, N.C., which it leased at varying times and capacities to defendants.

Plaintiff entered into the first lease (“the DDS lease”) with the State on 20 May 1999 for use by the Department of Health and Human Services, Disability Determination Services (“DDS”). Plaintiff and the State entered into a renewal agreement, the effect of which was to extend the DDS lease through 31 July 2019 and to include the so-called “availability of funds clause.” The availability of funds clause states:

15. The parties to this lease agree and understand that the continuation of this Lease Agreement for the term period set forth herein, or any extension or renewal thereof, is dependent upon and subject to the appropriation, allocation or availability of funds for this purpose to the agency of the Lessee responsible for payment of said rental. The parties to this lease also agree that in the event the agency of the Lessee or that body responsible for the appropriation

CAN AM S., LLC v. STATE OF N.C.

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of said funds, in its sole discretion, determines in view of its total local office operations that available funding for the payment of rents is insufficient to continue the operation of its local office on the premise leased herein, it may choose to terminate the lease agreement set forth herein by giving Lessor written notice of said termination, and the lease agreement shall terminate immediately without any further liability to Lessee.

Defendants have not attempted to exercise their right to terminate the DDS lease pursuant to the availability of funds clause.

On 6 November 2000, plaintiff and the State entered into the second lease (“the ACTS lease”) for use by an administrative unit of DHHS known as Automation Collections and Tracking System(s) (“ACTS”). The availability of funds clause was included in the ACTS lease, and after renewal, the lease was set to run through 28 February 2014. However, DHHS notified plaintiff on 12 May 2011 that the State was exercising its right to terminate the ACTS lease pursuant to the availability of funds clause, effective 30 June 2011. The State thus terminated the ACTS lease on 30 June 2011, removed ACTS from the premises, and stopped paying rent on the lease.

On 2 April 2001, plaintiff and the State entered into the third lease (“the CSE lease”) for use by the Child Support Enforcement (“CSE”) division of DHHS. The CSE lease also contained the availability of funds clause, and after renewal, the lease was set to run through 31 August 2014. However, the Department of Administration notified plaintiff on 15 August 2011 that the State was exercising its right to terminate the CSE lease pursuant to the availability of funds clause, effective 31 October 2011. A second termination letter was sent 26 September 2011 notifying plaintiff that the termination date was revised to 30 September 2011. The State terminated the CSE lease on 30 September 2011, removed CSE from the premises, and stopped paying rent on the lease.

Plaintiff filed suit against defendants on 23 October 2012 claiming breach of both the ACTS and CSE leases and seeking declaratory judgment prohibiting the State from terminating the DDS lease under the availability of funds clause. Defendants entered a motion to dismiss plaintiff’s complaint pursuant to Rules 12(b)(1), (2), and (6), claiming specifically that defendants’ sovereign immunity had not been waived in any way. By order entered 8 May 2013, the trial court denied defendants’ motion to dismiss in its entirety. Defendants filed timely notice of appeal.

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Motion to Dismiss

[1] Plaintiff filed a motion to dismiss this appeal on 7 January 2014. We must first determine what portion of defendants' appeal, if any, is properly before us. After careful review, we allow in part and deny in part plaintiff's motion to dismiss.

"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). "Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). However, N.C. Gen. Stat. § 1-277 (2013) allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction.

Here, defendants moved to dismiss plaintiff's cause of action pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2013) (lack of subject matter jurisdiction); N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (2013) (lack of personal jurisdiction); N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013) (failure to state a claim upon which relief can be granted). Specifically, defendants moved to dismiss both of plaintiff's claims under Rules 12(b)(1) and (2), but notably not Rule 12(b)(6), based on the defense of sovereign immunity. Defendants moved to dismiss the claim for a declaratory judgment under Rule 12(b)(6) for failure of the complaint to adequately plead an actual controversy.

Had defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a). *See Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010). However, defendants' sovereign immunity defense is premised on a lack of either subject matter jurisdiction under Rule 12(b)(1) or personal jurisdiction under Rule 12(b)(2). A denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right is therefore not immediately appealable under section 1-277(a). *See Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009); *Horne v. Town of Blowing Rock*, __ N.C. App. __, __, 732 S.E.2d 614, 616 (2012).

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Thus, discussion as to whether sovereign immunity raises the question of subject matter or personal jurisdiction under Rules 12(b)(1) and 12(b)(2) is necessary to analyze whether defendants may immediately appeal pursuant to section 1-277(b).

Initially, our Supreme Court held in *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982), that immediate appeal under section 1-277(b) is limited to adverse rulings on “minimum contacts” questions, not issues of personal jurisdiction generally. However, shortly over two months after the *Love* decision was entered, the Supreme Court in *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327-28, 293 S.E.2d 182, 184 (1982), hinted at the possibility of sovereign immunity defenses triggering immediate appeal under section 1-277(b). The Court noted that:

A viable argument may be propounded that the State, as a party, is claiming by the doctrine of sovereign immunity that the particular forum of the State courts has no jurisdiction over the State’s person. On the other hand, the doctrine may be characterized as an objection that the State courts have no jurisdiction to hear the particular subject matter of [the] claims against the State. Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction becomes crucial in North Carolina because G.S. 1-277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion. The determination of this issue is not essential to this Court’s authority to decide the instant case, however, because the case is before us on discretionary review under G.S. 7A-31, and we elect to exercise our supervisory authority to determine the underlying issues. . . . Therefore, we do not determine whether sovereign immunity is a question of subject matter jurisdiction or whether the denial of a motion to dismiss on grounds of sovereign immunity is immediately appealable.

The Supreme Court has yet to offer further guidance on this distinction.

However, apparently beginning with *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975), this Court has consistently held that: (1) the defense of

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sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b). *See Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 383, 269 S.E.2d 217, 219 (1980) (citing *Sides* for the proposition that “an immediate appeal lies under G.S. 1-277(b) from the trial court’s refusal to dismiss a suit against the State on grounds of governmental immunity”); *Zimmer v. N.C. Dep’t of Transp.*, 87 N.C. App. 132, 133–34, 360 S.E.2d 115, 116-17 (1987) (noting that the *Teachy* Court cited *Sides* and *Stahl-Rider, Inc.*, but did not expressly overturn them, and holding that the trial court’s denial of a Rule 12(b)(2) motion premised on sovereign immunity was immediately appealable under section 1-277(b) pursuant to those rulings); *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 99–100, 545 S.E.2d 243, 245–46 (2001) (relying on *Zimmer* for the same proposition); *Meherrin Indian Tribe*, 197 N.C. App. at 385, 677 S.E.2d at 207 (relying on *Data Gen. Corp.* for the same proposition).

Pursuant to this line of precedent, we enter the following disposition as to plaintiff’s motion to dismiss. First, we dismiss defendants’ appeal from the trial court’s order denying their Rule 12(b)(6) motion to dismiss based on the argument that plaintiff failed to adequately plead an actual controversy in the declaratory judgment claim; denial of this motion involves neither a substantial right under section 1-277(a) nor an adverse ruling as to personal jurisdiction under section 1-277(b), and thus is not immediately appealable. *See* N.C. Gen. Stat. § 1-277. Second, we dismiss defendants’ appeal from the trial court’s order denying their Rule 12(b)(1) motion based on the defense of sovereign immunity. As the *Meherrin Indian Tribe* Court held, orders denying Rule 12(b)(1) motions to dismiss based on sovereign immunity are not immediately appealable because they neither affect a substantial right nor constitute an adverse ruling as to personal jurisdiction. *Meherrin Indian Tribe*, 197 N.C. App. at 384, 677 S.E.2d at 207. However, we allow defendants’ appeal from the trial court’s order denying their Rule 12(b)(2) motion to dismiss based on sovereign immunity. As has been held consistently by this Court, denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b). *See id.*; *Data Gen. Corp.*, 143 N.C. App. at 99–100, 545 S.E.2d at 245–46; *Zimmer*, 87 N.C. App. at 133–34, 360 S.E.2d at 116; *Stahl-Rider, Inc.*, 48 N.C. App. at 383, 269 S.E.2d at 219.

In sum, we will consider only one issue on appeal: whether the trial court properly denied defendants’ Rule 12(b)(2) motion to dismiss on the ground of sovereign immunity.

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Discussion**I. Sovereign Immunity**

[2] Defendants argue that they did not expressly or impliedly waive their sovereign immunity and the trial court therefore erred by denying their motion to dismiss both the breach of contract claim and the claim for declaratory relief. We disagree.

The doctrine of sovereign immunity is well-settled in North Carolina:

It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit. By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute.

Welch Contracting, Inc. v. N.C. Dep't of Transp., 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005) (citations omitted). Sovereign immunity is not merely a defense to a cause of action; it is a bar to actions that requires a plaintiff to establish a waiver of immunity. *Arrington v. Martinez*, 215 N.C. 252, 263, 716 S.E.2d 410, 417 (2011). Thus, the trial court must determine “whether the complaint specifically alleges a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action.” *Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007) (internal quotation marks omitted). However, “[p]recise language alleging that the State has waived the defense of sovereign immunity is not necessary, but, rather, the complaint need only contain sufficient allegations to provide a reasonable forecast of waiver.” *Richmond Cnty. Bd. of Educ. v. Cowell*, __ N.C. App. __, __, 739 S.E.2d 566, 569 (2013) (citations and internal quotation marks omitted).

The seminal case on waiver of sovereign immunity in the context of contractual disputes is *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). In *Smith*, the North Carolina Supreme Court articulated five considerations which moved the Court to recognize an implied waiver of sovereign immunity where the State enters into a valid contract with a private party:

- (1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process;
- (2) To hold that the state may

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arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body “bad faith and shoddiness” foreign to a democratic government; (4) A citizen’s petition to the legislature for relief from the state’s breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.

Id. at 320, 222 S.E.2d at 423. Based on these considerations, the *Smith* Court held that “whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.” *Id.* at 320, 222 S.E.2d at 423-24. “Thus, . . . in causes of action on contract . . . the doctrine of sovereign immunity will not be a defense to the State.” *Id.* at 320, 222 S.E.2d at 424.

In order to analyze the trial court’s order denying defendants’ Rule 12(b)(2) motion to dismiss based on sovereign immunity here, we must consider: (1) whether plaintiff sufficiently pleaded that defendants waived their sovereign immunity; and (2) whether defendants expressly or impliedly waived sovereign immunity.

First, we hold that plaintiff sufficiently pleaded waiver of defendants’ sovereign immunity. The requirement that a plaintiff specifically allege waiver of governmental immunity “does not . . . mandate that a complaint use any particular language.” *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005). Rather, “consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity.” *Id.* Here, plaintiff specifically pleaded in its complaint that “[t]he defense of sovereign immunity is not applicable to any claims alleged herein.” Furthermore, plaintiffs pleaded with particularity the circumstances surrounding their entry into three facially valid contracts with defendants, which, as will be discussed below, amount to “facts, if taken as true, [that] are sufficient to establish a waiver by the State of sovereign immunity.” *Id.* at 38, 621 S.E.2d at 25.

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Next, we conclude that defendants impliedly waived their sovereign immunity by entering into the lease agreements with plaintiff. Defendants argue that because they did not breach either the ACTS or the CSE lease agreements, and because there is no proof that they will breach the DDS lease, plaintiff cannot establish waiver of sovereign immunity.¹ However, defendants cite to no authority, and we find none, for the proposition that waiver of sovereign immunity is contingent on breach of contract. This Court has consistently held that we are not to consider the merits of a claim when addressing the applicability of sovereign immunity as a potential defense to liability. *See Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 558 548 S.E.2d 788, 793 (2001) (noting that, when considering the applicability of sovereign immunity as a defense to breach of a governmental employment contract, “[this Court is] not now concerned with the merits of plaintiff’s contract action. . . . whether plaintiffs are ultimately entitled to relief [is a] question[] not properly before us”); *see also Smith*, 289 N.C. at 322, 222 S.E.2d at 424 (“We are not now concerned with the merits of the controversy. . . . We have no knowledge, opinion, or notion as to what the true facts are. These must be established at the trial. Today we decide only that plaintiff is not to be denied his day in court because his contract was with the State.”).

Furthermore, all applicable caselaw leads us to conclude that the State waives its sovereign immunity when it *enters* into a contract with a private party, not when it engages in conduct that may or may not constitute a breach. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24 (“[W]henever the State of North Carolina, through its authorized officers and agencies, *enters into a valid contract*, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.”) (emphasis added); *Ferrell v. Dep’t of Transp.*, 334 N.C. 650, 654, 435 S.E.2d 309, 312 (1993) (“[V]arious policy considerations compel the conclusion that when the State *enters into a contract through its authorized officers and agencies*, it implicitly consents to suit for damages if it breaches that contract.”) (emphasis added). It is plain to us that the phrases “in the event it breaches the contract” and “if it breaches that contract” in the cases above refer to the events that would typically

1. For example, defendants assert that: “In order to overcome the bar of sovereign immunity and establish an implied waiver of Defendants’ immunity to suit, the Plaintiff is required to plead with sufficient certitude that Defendants did indeed breach the lease contracts.” Regarding the DDS lease, defendants contend: “Plaintiff has not alleged that the State has breached the DDS lease in any manner and also has not alleged a sufficient factual basis to find that there is a likelihood the State will breach the DDS lease. Therefore, sovereign immunity bars Plaintiff’s claim for declaratory relief and the trial court erred in denying Defendants’ motion to dismiss.”

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trigger a suit against the State. They do not mean that the State only waives its sovereign immunity “in the event it breaches the contract” and “if it breaches that contract.” To hold otherwise would require a plaintiff to definitively establish its entire cause of action against the State in its complaint without the opportunity to conduct discovery, a result that was clearly unintended by the *Smith* Court when it adopted the doctrine of implied waiver of sovereign immunity in this context. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 423 (noting that the same policy considerations it identified as the basis for its holding are used in other states to hold that “a state implicitly consents to be sued upon any valid contract *into which it enters*”) (emphasis added).

Defendants also cite *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 546-47, 660 S.E.2d 662, 664 (2008) for the proposition that they did not waive sovereign immunity as a defense to plaintiff’s claim for a declaratory judgment. We disagree. This argument was previously addressed in *ACC v. University of Maryland*, __ N.C. App. __, __, 751 S.E.2d 612, 621 (2013), where this Court held that *Smith*’s recognition of waiver in “causes of action on contract” includes actions for declaratory relief seeking to ascertain the rights and obligations owed under a contract with the State. The *ACC* Court distinguished *Petroleum Traders Corp.* on the ground that the plaintiff in that case sought “a declaration that a statutorily authorized bidding fee . . . violated the North Carolina Constitution,” not a request to ascertain the rights and obligations owed by the parties to a contract. *Id.* at __, 751 S.E.2d at 620. Because plaintiff here is seeking to ascertain the rights and obligations of the parties to the DDS lease and is not asking for a declaration as to a potential constitutional breach, this case is more comparable to *ACC* than *Petroleum Traders Corp.* Therefore the holding in *ACC* that “declaratory relief actions are a ‘cause of action on contract’ sufficient to waive the State’s sovereign immunity” is binding and applicable here.

Because it is undisputed that plaintiff and defendants entered into three facially valid lease agreements, we hold that defendants impliedly waived their sovereign immunity from suit as to those contracts. We further conclude that it is inappropriate to consider the merits of plaintiff’s claims at this time, because such arguments are unnecessary to determine the dispositive issues on appeal, namely, whether defendants waived sovereign immunity.

Conclusion

For the foregoing reasons, we allow plaintiff’s motion to dismiss the appeal as to defendants’ Rule 12(b)(1) and (6) motions, but allow

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immediate appeal from the order denying defendants' Rule 12(b)(2) motion to dismiss on the ground of sovereign immunity. Because plaintiff sufficiently alleged waiver of sovereign immunity in its complaint and defendants impliedly waived sovereign immunity by entering into the lease agreements with plaintiff, we affirm the trial court's order denying defendants' motion.

AFFIRMED IN PART; DISMISSED IN PART.

Judges GEER and McCULLOUGH concur.

ALISA G. HENDERSON, PLAINTIFF

v.

JASON JORDAN HENDERSON, DEFENDANT

No. COA13-843

Filed 3 June 2014

1. Domestic Violence—time to file answer—up to ten days rather than full ten days

The trial did not exceed its jurisdiction in holding a hearing on a Domestic Violence Prevention Order (DVPO) because defendant was deprived of a full 10 days to file his answer. N.C.G.S. § 50B-2(c) states unequivocally that a hearing on an ex parte DVPO must be held “within 10 days” of the issuance of the DVPO or “within seven days” of the date of service of process, whichever is later. The statute gives defendant no more than 10 days to answer, not the absolute right to a full 10 day; moreover, defendant was permitted to appear and testify despite the fact that he had not filed an answer.

2. Domestic Violence—jurisdiction—stated purpose of hearing

The trial court did not exceed its jurisdiction entering a Domestic Violence Protective Order (DVPO) where defendant asserted that the hearing was not held in accordance with the notice he received, which stated that the purpose of the hearing was to determine whether the ex parte order should be continued. A hearing to determine whether to continue the trial court's ex parte order must be a hearing to determine whether the trial court's protective order should be continued beyond the temporary time frame of the ex parte DVPO.

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3. Domestic Violence—findings—statements made during investigation

In a hearing on a Domestic Violence Prevention Order, the evidence justified the trial court's findings of fact even though certain statements by the children were made in the context of DSS's investigation. The mere existence of a DSS investigation did not mean that domestic violence had occurred.

4. Domestic Violence—findings—children's statements—specificity about dates

Plaintiff's inability to be specific about certain dates was not fatal to the findings in a Domestic Violence Prevention Order. Young children cannot be expected to be exact regarding times and dates, and a child's uncertainty as to time or date goes to the weight rather than the admissibility of the evidence.

Appeal by Defendant from Orders entered 8 February 2013 by Judge Ned W. Mangum, 18 and 20 February 2013 by Judge Robert B. Rader, and 18 April 2013 by Judge Margaret Eagles in Wake County District Court. Heard in the Court of Appeals 22 January 2014.

Cranfill Sumner & Hartzog LLP, by M. Denisse Gonzalez, for Plaintiff.

Edmundson & Burnette, L.L.P., by James T. Duckworth, III, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

This case arises from the filing of a complaint for a domestic violence protective order ("DVPO") by Plaintiff Alisa G. Henderson. The complaint was filed on 8 February 2013 and alleged that Plaintiff's former spouse, Defendant Jason Jordan Henderson, intentionally caused bodily injury to the parties' children, both girls, by frequently spooning with them in his underwear, grabbing their buttocks, placing cameras in their rooms while they were dressing, and beating them with belts, his hands, and a wooden spoon while other children were forced to watch. The complaint also asserted that Defendant placed the children in actual fear of imminent serious bodily injury by cursing at and threatening the children, allowing a friend to offer alcohol to one of the children, and becoming intoxicated to the point of falling over. Given

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these allegations, the trial court issued a temporary, *ex parte* DVPO on 8 February 2013. The *ex parte* DVPO was effective through 18 February 2013, and a hearing was set for the same date. Defendant received notice of the entering of the *ex parte* DVPO and the 18 February 2013 hearing. Therein, Defendant was informed that the purpose of the hearing was to determine “whether the [o]rder will be continued.”

Evidence presented at the hearing tended to show that Plaintiff and Defendant are divorced with two daughters, Eliza and Anna.¹ At the time of the hearing, Eliza was fourteen and Anna was eleven. The parties shared joint custody of the children before the DVPO was issued. Both parties are now re-married, and Defendant has two daughters from his current marriage.

According to a social worker at the Wake County Division of Social Services (“DSS”), DSS received a report on 8 February 2013 alleging a number of instances of misconduct by Defendant. At the time of the hearing, the allegations had not been substantiated. Nonetheless, DSS had implemented a safety plan for the children. The children would stay with Plaintiff and have no unsupervised contact with Defendant.

At the close of the hearing, the trial court found that “there have been acts that constitute domestic violence.” Thus, the court entered a DVPO for a period of one year, ordering Defendant, *inter alia*, to abide by the DSS safety plan and refrain from any unsupervised contact with Eliza and Anna during that period. A written DVPO was filed the same day, memorializing the court’s oral pronouncement. An amended DVPO was filed two days later, on 20 February 2013, providing that, as a law enforcement officer, Defendant may possess or use a firearm for official use.

On 15 March 2013, Defendant filed notice of appeal from the trial court’s 8, 18, and 20 February 2013 orders. That same day, Defendant filed a motion to vacate or set aside the DVPO under Rule 60(b) of the North Carolina Rules of Civil Procedure. The trial court denied Defendant’s motion by order filed 28 March 2013. On 18 April 2013, the trial court filed a second, written order denying Defendant’s motion to vacate. The court determined that it retained jurisdiction over Defendant’s motion pursuant to Rule 60(b), despite the fact that Defendant had already filed his notice of appeal of the DVPO orders. The court concluded that Defendant was not entitled to relief pursuant to Rule 60(b)(4) or (6) because the DVPO was not void and because “Defendant was unable to

1. Pseudonyms are used for the protection of the juveniles.

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show that any extraordinary circumstances exist or that justice demands for the DVPO to be vacated.” Defendant also appealed from that order.

Discussion

On appeal, Defendant argues that the DVPO and amended DVPO are void because the trial court acted in excess of its jurisdiction. Therefore, Defendant asserts, the trial court erred in denying his Rule 60(b) motion to vacate. Alternatively, Defendant contends that the trial court’s findings of fact are not supported by competent evidence and, thus, do not support its conclusion that Defendant committed acts of domestic violence against the children and put them in serious and immediate danger of injury. We affirm.

I. Subject Matter Jurisdiction

Defendant first argues that the trial court lacked subject matter jurisdiction to enter the DVPO because the court (1) failed to follow statutory procedure by not allowing Defendant 10 days following service of the summons and complaint to file an answer, and (2) held the DVPO hearing on the merits rather than for the purpose of simply continuing the *ex parte* order. We disagree.

“Where jurisdiction is statutory and the [l]egislature requires the [trial court] to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction.” *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975). “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) (italics added).

(1) Time to File an Answer

[1] Section 50B-2 of the North Carolina General Statutes applies to the institution of civil actions, motions for emergency relief, temporary orders, and temporary custody in domestic violence cases. N.C. Gen. Stat. § 50B-2 (2013). Relevant to this appeal, subsections (a) and (c) provide as follows:

(a) . . . Any action for a [DVPO] requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the defendant to answer within 10 days of the date of service. . . .

...

(c) *Ex Parte* Orders. —

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...

- (5) Upon the issuance of an *ex parte* order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. A continuance shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown. . . .

...

- (7) Upon the issuance of an *ex parte* order under this subsection, if the party is proceeding *pro se*, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection[] and shall effect service of the summons, complaint, notice, order[,] and other papers through the appropriate law enforcement agency where the defendant is to be served.

N.C. Gen. Stat. § 50B-2 (*italics added*). Here, Defendant was served with his summons on 12 February 2013. On appeal, Defendant contends that the trial court violated subsection (a) and, therefore, exceeded its jurisdiction because he was required to appear for the hearing on 18 February 2013, depriving him of a full 10 days to file his answer. We disagree.

“[T]he Rules of Civil Procedure apply to actions under Chapter 50B, except to the extent that a differing procedure is prescribed by statute.” *Hensey v. Hennessy*, 201 N.C. App. 56, 62, 685 S.E.2d 541, 546 (2009) (citation and internal quotation marks omitted). Relevant to this case, section 50B-2 sets forth specialized procedures to “deal with issuance of . . . *ex parte* DVPOs,” which are distinct from those for issuing temporary restraining orders. *Id.* at 63, 685 S.E.2d at 546 (*italics added*). Instead, “[t]he procedures under [section] 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants.” *Id.* at 63, 685 S.E.2d at 546–47. Moreover,

in construing statutes[,] courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend

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untoward results. Accordingly, an unnecessary implication arising from one statutory section, inconsistent with the express terms of another on the same subject, yields to the expressed intent.

Romulus v. Romulus, 216 N.C. App. 28, 34, 715 S.E.2d 889, 893 (2011) (citation omitted). Similarly, the words in a statute “must be interpreted in context so as to render them harmonious with the intent and tenor of the entire statute and must be accorded the meaning which harmonizes with the other modifying provisions so as to give effect to the reason and purpose of the law.” *Underwood v. Howland*, 274 N.C. 473, 479, 164 S.E.2d 2, 7 (1968).

Defendant’s contention that he has the right to a period of 10 days in which to file his answer is inconsistent with subsection 50B-2(c), which explicitly pertains to “[e]x [p]arte [o]rders.” N.C. Gen. Stat. § 50B-2(c) (italics added). Subsection (c)(5) states unequivocally that a hearing on an *ex parte* DVPO must be held “within 10 days” of the issuance of the DVPO or “within seven days” of the date of service of process, whichever is later. N.C. Gen. Stat. § 50B-2(c)(5). Subsection (c)(7) clarifies that, when the complaining party is proceeding *pro se*, the clerk must set a hearing date “within the time periods provided in this subsection.” N.C. Gen. Stat. § 50B-2(c)(7). Accordingly, if service of process occurs even one day after the issuance of an *ex parte* DVPO, the subsequent hearing must occur *before* the 10-day period of time within which Defendant might otherwise be allowed to answer. To interpret subsection (a) according to Defendant’s logic would strip subsections (c)(5) and (7) of any rational construction. We decline Defendant’s invitation to do so.

As we noted in *Hensey*, the “fundamental nature and purpose of an *ex parte* DVPO” is that it must be “entered on relatively short notice in order to address a situation in which quick action is needed . . . to avert a threat of imminent harm.” 201 N.C. App. at 63, 685 S.E.2d at 547. Similarly, the hearing on the *ex parte* DVPO must be conducted quickly in order to ensure that the rights of both parties, the complainant and the respondent, are not infringed. Subsection (c) encapsulates this principle by ensuring that both parties are able to present their positions to the trial court in a timely manner. To the extent that subsection (a) might otherwise suggest that the defendant has a longer period of time in which to answer,² subsection (c) supersedes it by mandating the

2. We do not hold that subsection (a) gives a defendant in a section 50B case the absolute right to a full 10 days in which to file an answer. On the contrary, we conclude that the statute gives him *no more than* 10 days to answer.

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time limits for the court to conduct the hearing after the issuance of an *ex parte* DVPO. See N.C. Gen. Stat. § 50B-2. In the circumstance in which, as here, the hearing on the *ex parte* DVPO must be held before the expiration of 10 days after service of process on the defendant, the defendant is required to answer, if at all, within the period of time leading up to the hearing as prescribed by subsection (c)(5).

Here, the *ex parte* DVPO was issued on 8 February 2013, and Defendant was served with a summons and notice of the hearing on 12 February 2013. Pursuant to section 50B-2(c), the hearing was set to occur within seven days of the date of service of process and within 10 days of the date of the issuance of the order, on 18 February 2013. Following service of process, Defendant had at least five days in which to submit a formal, written answer. At the hearing, Defendant had the opportunity to further respond to Plaintiff's allegations. He was permitted to appear and testify despite the fact that he had not filed an answer. This comports with section 50B-2. Accordingly, Defendant's argument is overruled.

(2) *The Purpose of the DVPO Hearing*

[2] Defendant also argues that the trial court exceeded its jurisdiction by holding a hearing on whether to issue a DVPO. Specifically, Defendant asserts that this hearing was not held in accordance with the notice he received, which stated that the purpose of the hearing was to determine whether the *ex parte* order should be continued. Citing case law which prohibits the court from entering a permanent injunction during a hearing on a temporary restraining order ("TRO"), Defendant contends that the "express, unambiguous language" of the notice informed him that "the hearing is *not* to decide the claim on the merits; rather the hearing's function is to determine whether the *ex parte* order should be continued in effect until a *future* hearing, when [the] plaintiff's claims . . . would be decided." (Certain italics added). We disagree.

As discussed in *Hensey*, the procedures for *ex parte* DVPOs are distinct from the procedures for TROs. 201 N.C. App. at 63, 685 S.E.2d at 546. Defendant's attempt to liken this case to one involving a TRO or a permanent injunction is misplaced. The process of issuing an *ex parte* DVPO is completed once the trial court determines that the complainant, alone, has alleged sufficient facts to show a "danger of acts of domestic violence." See *id.* at 65, 685 S.E.2d at 548. It is nonsensical to suggest that a hearing involving both parties could possibly be for the purpose of

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continuing an *ex parte* DVPO. In accordance with the term “*ex parte*,”³ such orders are not intended to be issued with input from both sides. Therefore, a hearing to determine whether to continue the trial court’s order, notice of which must be given to the opposing party, cannot be a hearing on whether to continue the *ex parte* DVPO. Instead, it must be a hearing to determine whether the trial court’s protective order should be continued beyond the temporary time frame of the *ex parte* DVPO.

Defendant’s argument that the trial court lacked jurisdiction to enter the 18 February 2013 order and 20 February 2013 amended order is overruled. The trial court did not exceed its jurisdiction in entering those orders. Accordingly, Defendant’s argument that the trial court erred in denying his Rule 60(b) motion to vacate the DVPO for lack of jurisdiction is also overruled.⁴

II. The Trial Court’s Findings and Conclusions

[3] Alternatively, Defendant asserts that the trial court’s 18 February 2013 DVPO and 20 February 2013 amended DVPO must be reversed because certain of the court’s findings of fact are not based on competent evidence and, without those findings, the trial court’s conclusions of law are improper. Again, we disagree.

“The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation and internal quotation marks omitted), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). The trial court made the following relevant findings of fact in the challenged orders:

3. On . . . Jan. 5, 2013, . . . [D]efendant
 - a. attempted to cause . . . bodily injury to . . . [the children;]
 - b. placed in fear of imminent serious bodily injury . . . a member of the plaintiff’s family[;]

3. “*Ex parte*” means “[d]one or made at the instance and for the benefit of *one party only*, and *without notice to*, or argument by, *any person adversely interested*; of or relating to court action taken by one party without notice to the other, usu[ally] for temporary or emergency relief[.]” Black’s Law Dictionary 657 (9th ed. 2009) (emphasis added).

4. Defendant’s argument that the trial court erred by denying his Rule 60(b) motion to vacate is based entirely on his argument that the trial court lacked jurisdiction to enter the 18 and 20 February 2013 orders.

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...

d. committed an act defined by [N.C. Gen. Stat. §] 14-[27.5A (sexual battery)] against the [children] by BECOMING EXTREMELY INTOXICATED WHILE CARING FOR THE CHILDREN AND ENGAGED IN INAPPROPRIATE CONTACT, CHILDREN DISCLOSED PRIOR INCIDENTS OF PHYSICAL AND VERBAL ABUSE INCLUDING HITTING W/A BELT AND THREATENING TO KNOCK THEIR TEETH DOWN THEIR THROAT. ALSO, [DEFENDANT] INAPPROPRIATELY SQUEEZED BUTTOCKS OF MINOR DAUGHTER. CONDUCT HAS RESULTED IN EMOTIONAL HARM TO CHILDREN RESULTING IN THREATS OF SELF[-]HARM.

Based upon those findings, the court concluded that:

2. . . . [D]efendant has committed acts of domestic violence against the minor child(ren) residing with or in the custody of . . . [P]laintiff.
3. There is a danger of serious and immediate injury to the minor child(ren). . . .

Defendant argues that findings 3(a), 3(b), and 3(d) are not supported by the evidence because they are based on statements made by the children to Plaintiff and the children's psychiatrist in the context of an *ongoing* DSS investigation. For support, Defendant cites *Burress v. Burress*, where we stated that the "results" of a DSS investigation might be relevant to the issue of domestic violence, but the mere existence of the investigation is not. 195 N.C. App. 447, 450, 672 S.E.2d 732, 734 (2009). Defendant contends that, as in *Burress*, the evidence concerning the children's allegations is irrelevant because it stems from "reports of abuse," not the "results" of a DSS investigation. Defendant also asserts that Plaintiff's testimony is not competent because it did not reference specific dates of the acts at issue. We are unpersuaded.

Plaintiff offered the following pertinent testimony at trial:

[PLAINTIFF]: [Eliza] went to her . . . psychiatrist appointment and told of drunken episodes that happened in the house in which there were seven children in the house; two of which were my children.

And . . . [Defendant] and a friend offered my daughter alcohol. She did not drink it, but it ended up with the one man passed out on the floor; my ex-husband in a drunken stupor.

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[My daughter] asked him, “What do I look like to you?” And he said, “You look like [a] n i-g-g-e-r.” And then spilled alcohol on the floor; made [Eliza] clean it up: “Clean this s-h-i-t up.” . . .

. . .

[My daughters] have actually exhibited self-harm such as cutting themselves because . . . the discipline of [Defendant] is so strict and strong that when he disciplines them, they express wanting to kill themselves and cutting themselves.

. . .

JUDGE . . . : All right. So this incident that you spoke of when they were — when he was intoxicated —

[PLAINTIFF]: Yes, sir.

JUDGE . . . : — and had another man in the house, when was this?

[PLAINTIFF]: It was January 5th. But there’s been ongoing over-the-top abuse: spankings with belts, one much — the younger child was made to stand there and — in front — he had all three children sit down on the couch[] and said, “This is what happens when you forget your agenda at school.” And spanked her with a belt in front of all three children.

He curses at . . . them. He yells at them. He screams at them. . . .

JUDGE . . . : All right. Now, as I understand it, there were more allegations than what you’ve just told me in your —

[PLAINTIFF]: Yes, sir. Yes, sir. There is the spooning incident that happened with [Eliza]. [Defendant] spooned with her in his underwear. . . .

JUDGE . . . : When was that?

[PLAINTIFF]: [Eliza] said that he does it very often. I don’t have a date.

JUDGE . . . : And then was there some — you’ve also alleged some inappropriate contact?

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[PLAINTIFF]: Yes. He slaps her on the bottom and squeezes her bottom, which I feel, obviously, very inappropriate for a 14[]year[]old or even 11[-]year[-]old girls.

JUDGE . . . : All right. And you said there were threats of violence or extensive violence? Was it — physical violence?

[PLAINTIFF]: Yes. [Defendant] threatens, “If — if you tell what happens in my home — if you tell family business or tell daddy/daughter secrets,” he said in the past, “I will knock your teeth down your throat.”

JUDGE . . . : And what’s the most recent time that that has happened?

[PLAINTIFF]: I don’t know. I know that it happens quite often. My youngest actually has told myself and the DSS worker that when she — every time she sees a belt, she has flashbacks, and she gets afraid.

She says she has nightmares every night and headaches quite often, and she’s very [emotionally] scarred.

. . .

[Regarding the intoxication incident, Eliza] was very afraid, and she asked the friend, “Do I need to call an ambulance for you? What do I need to do?” ‘Cause he was laying on the floor, talking out of his mind. [Defendant] started speaking Spanish. He doesn’t speak Spanish. This is according to my daughter.

And so, [Eliza] had to be responsible, while these men were intoxicated, for all [seven] children [who were in the house at the time].

. . .

. . . May I say something else?

JUDGE . . . : Sure.

[PLAINTIFF]: Okay. After [Eliza] told the psychiatrist about the incident, she said — and she knew that she was going to make the DSS report. She said, “Do I have to go back to Dad’s?” She said, “Cause if I do, he’s going to hurt me.”

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Several times she has busted out into tears because of fear of her father.

Testifying for himself, Defendant admitted becoming intoxicated, getting sick, and throwing up while supervising the children on January 5th, but asserted that he still “kn[ew] what was going on around the house[.]” Defendant also admitted to cursing in front of the children, yelling at them, and, approximately four years before the hearing, spanking one of the children with a belt until she began to make retching sounds.

Defendant’s admissions and Plaintiff’s testimony constitute competent evidence to justify the trial court’s findings of fact. Plaintiff testified to multiple circumstances in which Defendant vigorously spanked the children, and Defendant admitted to hitting one daughter until she made retching sounds. Plaintiff testified that Defendant threatened the children, spooned with them, and squeezed their buttocks. According to Plaintiff, this distressed the children, causing them to exhibit self-harm and express an interest in suicide. Plaintiff testified that Anna has nightmares every night, headaches on a regular basis, and is now emotionally scarred. Plaintiff also testified to an incident in which Defendant became intoxicated, which Defendant admitted. On that occasion, according to Plaintiff, Defendant was unable to stand or supervise the children and began babbling in Spanish.

It does not matter that certain of these allegations were also made in the context of DSS’s investigation. In *Burress*, we found irrelevant the plaintiff’s testimony that “[DSS] was investigating allegations of sexual abuse against the plaintiff’s minor children by [the] defendant” because the mere existence of a DSS investigation does not mean that domestic violence has occurred. *Id.* at 450, 672 S.E.2d at 734. As no evidence was presented in that case regarding what was revealed by the investigation, however, we did not have the opportunity to address whether statements made in the context of a DSS investigation would also be irrelevant. *See id.* We hold that they are not. To hold otherwise would create a conflict of interest in which the plaintiff in a domestic violence case is incentivized to decline sharing information with DSS for fear of having her testimony stricken at a subsequent DVPO hearing. We decline to reach such a result here. Plaintiff testified to statements made to her by her children about what they experienced with Defendant.⁵ In addition, Plaintiff

5. Defendant does not argue that Plaintiff’s testimony about statements her daughters made directly to her is incompetent as inadmissible hearsay. In addition, Defendant did not make any objection on those grounds at the hearing. Therefore, any such objection is waived, and Plaintiff’s testimony is not incompetent in that respect. *See In re Ivey*, 156 N.C. App. 398, 403, 576 S.E.2d 386, 390 (2003) (holding that the respondent-parents

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described her personal observations of the adverse effects Defendant's actions have had on her daughters' behavior and emotional health. The fact that some of the children's statements were also made to DSS does not render the rest of Plaintiff's testimony irrelevant and incompetent. Accordingly, Defendant's argument is overruled.

[4] Moreover, Plaintiff's inability to provide specific dates with regard to certain of the incidents, which were largely described to her by her children, is not fatal. *See State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) ("We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence."). Therefore, we hold that the trial court's findings of fact in the 18 February 2013 and 20 February 2013 orders are based on competent evidence and, in turn, fully support its conclusions of law. Accordingly, Defendant's alternative argument is overruled. The orders appealed from are

AFFIRMED.

Judges STEELMAN and DAVIS concur.

waived their argument that certain testimony constituted inadmissible hearsay because they failed to object to the testimony at the permanency planning hearing); *see also In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753 (2009) (commenting that "no objection on hearsay grounds was made by either parent [at the termination of parental rights hearing]. Therefore, any objection has been waived, and the testimony must be considered competent evidence.") (citation omitted); N.C.R. App. P. 10(a)(1).

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[234 N.C. App. 142 (2014)]

JACKSON KAHIHU, PLAINTIFF

v.

RAYMOND BRUNSON, DEFENDANT

No. COA13-1121

Filed 3 June 2014

1. Process and Service—summons never received—directed verdict

The trial court did not err by granting defendant Integon's motion for directed verdict where plaintiff presented evidence that Integon had been served with a copy of the summons and amended complaint, but the trial court necessarily concluded that the affidavit of an employee of the registered agent of Integon rebutted the presumption of valid service by showing that Integon never received a copy of the summons.

2. Insurance—uninsured motorist—insurer a separate party—service required

The trial court did not err in an action arising from a car accident in its determination that defendant Integon was required to be served with a copy of the complaint and summons to be made a party to the action. N.C.G.S. § 20-279.21(b)(3)a establishes that the insurer is a separate party to the action between the insured plaintiff and an uninsured motorist.

Appeal by plaintiff from order entered 12 March 2013 by Judge Nancy E. Gordon in Durham County District Court. Heard in the Court of Appeals 5 February 2014.

The Law Offices of Andrew J. Kisala, PLLC, by Andrew J. Kisala, for plaintiff-appellant.

Law Offices of Robert E. Ruegger, by Robert E. Ruegger, for defendant Integon National Insurance Company, defendant-appellee.

McCULLOUGH, Judge.

Plaintiff Jackson Kahihu challenges an order granting defendant Integon National Insurance Company's motion for directed verdict. For the reasons stated herein, we affirm the order of the trial court.

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I. Background

On 23 September 2011 Plaintiff Jackson Kahihu filed a complaint against defendant Raymond Brunson. Plaintiff alleged the following: On 22 April 2011, plaintiff and defendant Brunson were involved in a car accident in Durham, North Carolina. Plaintiff was driving west in the right lane on Holloway Street near U.S. 70 when defendant Brunson was driving west in the left lane on the same street. As defendant Brunson was approaching the PVA turnoff to 2101 Holloway Street, he “immediately and without warning swerved across the right lane and suddenly applied his brakes which caused him to rapidly decelerate in front of Plaintiff’s vehicle, leaving Plaintiff unable to stop before colliding with Defendant [Brunson].” “The sudden swerving and braking action by Defendant [Brunson] left Plaintiff unable to stop before colliding into the back of Defendant [Brunson]’s vehicle.” Plaintiff alleged that due to defendant Brunson’s negligence, plaintiff had suffered damage to his property, physical injuries, and other expenses.

The civil summons, issued on 23 September 2011, was returned to plaintiff on 2 November 2011, stating that defendant Brunson was not served. The civil summons included the following notation: “No contact mult. attempts + note.”

On 8 November 2011, plaintiff filed a “Motion for Entry of Default” for entry of default and default judgment against defendant Brunson for failure to plead. On the same day, plaintiff’s counsel filed an “Affidavit of Service by Certified Mail.” Plaintiff’s counsel testified that upon filing the complaint on 23 September 2011, he mailed a file-stamped Civil Summons and Complaint to defendant Brunson via United States postal service certified mail, addressed to defendant, return receipt requested. Plaintiff’s counsel testified that on 24 September 2011, the summons and complaint were delivered to defendant Brunson’s place of residence and “signed for by a person presumably of suitable age and discretion who is an agent for Defendant.” On 8 November 2011, the trial court entered an “Entry of Default” against defendant Brunson for failure to plead.

On 10 February 2012, plaintiff filed an amended complaint. That same day, plaintiff filed a “Motion to Set Aside Entry of Default” as to defendant Brunson. Plaintiff argued in the motion that “[a]ll responsible parties were not known to Plaintiff on the date of his Motion for Entry of Default through no fault of his own, and could not have been discovered through due diligence.” Based on the foregoing, plaintiff asserted that he failed to correctly serve all responsible parties pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and wished to amend

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his complaint. On 10 February 2012, the trial court entered an “Order Setting Aside Entry of Default” as to defendant Brunson.

On 23 March 2012, plaintiff filed a “Motion for Entry of Default” against defendant Brunson. Thereafter, the trial court filed an “Entry of Default” against defendant Brunson.

Also on 23 March 2012, plaintiff’s counsel filed an “Affidavit of Service by Certified Mail,” amended 26 March 2012, alleging that on 24 September 2011, a summons and complaint was delivered to defendant Brunson’s place of residence and signed by a person presumably of suitable age and discretion who is agent for defendant Brunson. The affidavit also stated that after learning that this case would proceed as an uninsured motorists claim, plaintiff’s counsel mailed a file-stamped Civil Summons and Complaint on 16 February 2012 to plaintiff’s insurance company and provider of his uninsured motorists policy, GMAC Insurance Management Corporation (“GMAC”) or previously named Integon National Insurance Company. The summons and complaint were sent via United States postal service certified mail, addressed to GMAC’s registered agent on file with the North Carolina Secretary of State, return receipt requested. Plaintiff’s counsel testified that on 17 February 2012, the summons and complaint were delivered to GMAC’s registered agent and signed for by a person presumably of suitable age and discretion who is an agent for GMAC.

On 28 March 2012, Integon National Insurance Company (“defendant Integon”) filed an Answer. Defendant Integon moved to dismiss plaintiff’s action for lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process. Defendant Integon also moved to dismiss plaintiff’s action for lack of jurisdiction over defendant Brunson, insufficiency of process over defendant Brunson, and insufficiency of service of process over defendant Brunson.

On 7 May 2012, plaintiff filed a motion for default judgment against defendant Brunson and defendant Integon. Plaintiff argued that the final day for defendant Brunson to timely file an answer to plaintiff’s 10 February 2012 amended complaint was 16 March 2012. Plaintiff also asserted that defendant Integon’s final day to timely file an answer was 22 March 2012.

On 14 May 2012, the trial court entered an order finding the following:

2. [Defendant Brunson and defendant Integon] have been legally served with process.

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3. [Defendant Brunson and defendant Integon] have failed to timely answer in a manner allowed by the North Carolina Rules of Civil Procedure, and are adjudged to be in default.
4. Plaintiff maintained a policy of uninsured motorists coverage with Defendant INTEGON.

Accordingly, plaintiff's motion for default judgment was granted and default judgment was entered against defendant Brunson and defendant Integon.

On 13 June 2012, defendant Integon filed a "Motion to Set Aside Default Judgment" pursuant to Rules 60(b)(1), (3), and (6) of the North Carolina Rules of Civil Procedure. Defendant Integon argued that plaintiff erroneously proceeded with a motion for default judgment on 14 May 2012 against defendant Integon, without first obtaining an entry of default against defendant Integon. Defendant Integon asserted that no entry of default could have been entered against defendant Integon because the trial court lacked "authority to enter an Entry of Default against a party after that party has filed its Answer."

Following a hearing held on 16 July 2012 on defendant Integon's motion to set aside the default judgment, the trial court entered an "Order Setting Aside Default Judgment Against Unnamed Defendant" on 20 July 2012. The trial court concluded, *inter alia*, that defendant Brunson and defendant Integon are two separate entities and that an entry of default against defendant Brunson is not binding as an entry of default against defendant Integon. Thus, the trial court granted defendant Integon's motion to set aside default judgment pursuant to Rule 60(b)(6)¹.

On 30 October 2012, plaintiff filed a motion for summary judgment against defendant Brunson. On 20 November 2012, the trial court entered an order granting plaintiff partial summary judgment against defendant Brunson as to the property damages specifically pled in plaintiff's amended complaint.

The case came on for trial at the 12 March 2013 session of Durham County District Court. At the close of plaintiff's evidence, defendant Integon moved for a directed verdict.

1. N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2013) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) Any other reason justifying relief from the operation of the judgment."

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On 12 March 2013, the trial court entered an order, finding that no summons was ever served on defendant Integon. Furthermore, the trial court found that defendant Integon preserved its challenge to jurisdiction in its answer and did not stipulate in the pre-trial order that the trial court had jurisdiction in this action. Thus, defendant Integon's motion for directed verdict was allowed for failure to serve a civil summons and complaint as required by Rule 4 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 20-279.21(b)(3)(a).

The case continued as a bench trial and judgment was entered on 19 March 2013 entitling plaintiff to recover for personal injury from defendant Brunson. On 21 March 2013, plaintiff filed a "Motion to Alter or Amend Judgment or New Trial Pursuant to Rules 59 & 60" which the trial court denied on 6 June 2013.

Plaintiff appeals the 12 March 2013 granting directed verdict in favor of defendant Integon.

II. 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." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (citation omitted). "If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied." *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004) (citation omitted).

III. Discussion

Plaintiff argues that the trial court erred (A) in granting defendant Integon's motion for directed verdict based on the finding that defendant Integon was not served with a summons and (B) by determining that defendant Integon needed to be served with a copy of the complaint and summons to be made a party to the action.

A. Directed Verdict

[1] First, plaintiff argues that the trial court erred by granting defendant Integon's motion for directed verdict where plaintiff presented evidence that defendant Integon had been served with a copy of the summons and amended complaint. Plaintiff relies on the 26 March 2012 "Amended Affidavit of Service by Certified Mail" filed by plaintiff's attorney. He argues that this affidavit created a presumption of service which defendant Integon failed to rebut.

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We note that section 20-279.21(b)(3) of the North Carolina General Statutes

unequivocally requires that the [uninsured motorist] carrier be served *with a copy of the summons and complaint* in order to be bound by a judgment against the uninsured motorist. Subsection (b)(3) further directs that upon service of process, the [uninsured motorist] carrier shall become a party to the suit and shall have the time allowed by statute to file responsible pleadings.

Liberty Mutual Insurance Co. v. Pennington, 356 N.C. 571, 576, 573 S.E.2d 118, 122 (2002) (emphasis added); *see also Darroch v. Lea*, 150 N.C. App. 156, 160, 563 S.E.2d 219, 222 (2002).

The filing of an affidavit of service that complies with the requirements set out in section 1-75.10 of the North Carolina General Statutes creates a rebuttable presumption of valid service. *See Goins v. Puleo*, 350 N.C. 277, 280-81, 512 S.E.2d 748, 750-51 (1999). N.C. Gen. Stat. § 1-75.10 provides:

- (a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

....

- (4) Service by Registered or Certified Mail. – In the case of service by registered or certified mail, by affidavit of the serving party averring:
- a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
 - b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
 - c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(4) (2013).

Here, plaintiff's attorney filed an "Affidavit of Service by Certified Mail." Plaintiff's affidavit of service stated that on 16 February 2012,

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plaintiff's attorney mailed a file-stamped summons and amended complaint to defendant Integon via certified mail, return receipt requested. This affidavit complied with the requirements set out in N.C. Gen. Stat. § 1-75.10, thereby creating a rebuttable presumption of valid service.

Defendant Integon argues that the trial court necessarily concluded that the affidavit of Andrew Gachaiya, an employee of Corporation Service Company ("CSC") who is the registered agent of defendant Integon, rebutted the presumption of valid service. We agree.

Gachaiya's affidavit stated that CSC documents and maintains records of "all documents served upon it on behalf of the companies for which it is registered agent." Gachaiya stated that he had reviewed its records to identify all documents plaintiff had served on it as defendant Integon's registered agent. According to Gachaiya, on 17 February 2012, "CSC's North Carolina office received via certified mail an Amended Complaint addressed to Corporation Service Company in the matter of *Jackson Kahihu vs. Raymond Brunson* Case Number 11CVD05031 in the Durham County District Court[.]" Gachaiya's affidavit made no mention of receiving a copy of the summons. In addition, CSC received an affidavit of service and an amended affidavit of service on 26 March 2012 and 28 March 2012, respectively. Furthermore, Gachaiya's affidavit stated that "prior to March 27, 2012, CSC did not notify or communicate in any manner the existence of the [matter of *Kahihu v. Brunson* Case Number 11 CVD 05031 in Durham County District Court] to GMAC Insurance Management Corporation."

Based on the foregoing, we hold that Gachaiya's affidavit rebutted the presumption of service by showing that defendant Integon never received a copy of the summons on 17 February 2012 and the trial court could properly find that defendant Integon was not served with a copy of the summons as required by N.C. Gen. Stat. § 20-279.21(b) (3). Accordingly, the trial court was without jurisdiction over defendant Integon and did not err in granting defendant Integon's motion for directed verdict.

B. Insurer as a Separate Party

[2] In his last argument, plaintiff contends that the trial court erred in its determination that defendant Integon was required to be served with a copy of the complaint and summons to be made a party to his action. We disagree.

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Section 20-279.21(b)(3)a (2013) of the North Carolina General Statutes provides that all liability insurance policies are subject to the following:

A provision that the 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; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. 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 consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists.

N.C. Gen. Stat. § 20-279.21(b)(3)a establishes that the insurer is a separate party to the action between the insured plaintiff and an uninsured motorist. *Grimstey v. Nelson*, 342 N.C. 542, 546, 467 S.E.2d 92, 95 (1996). It is well established that “[N.C. Gen. Stat.] § 20-279.21(b)(3)a unambiguously provides that an uninsured motorist carrier may defend in the name of the uninsured motorist or in its own name, evincing a legislative recognition that the uninsured motorist and the insurer providing uninsured motorist coverage are separate parties with independent interests.” *Reese v. Barbee*, 129 N.C. App. 823, 826, 501 S.E.2d 698, 700 (1998) (citation omitted). Therefore, “in order for the insurer to be

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bound by a judgment against the uninsured motorist, service of process must be obtained upon the insurer.” *Id.* Based on the foregoing reasons, we must reject plaintiff’s arguments.

IV. Conclusion

Where the trial court did not err in granting defendant Integon’s motion for directed verdict, we affirm the order of the trial court.

Affirmed.

Judges HUNTER, Robert C., and GEER concur.

MICHELE LaFRAGE PETER AND CARL PETER, PLAINTIFFS

v.

JOHN VULLO, M.D., SOUTHEAST ANESTHESIOLOGY CONSULTANTS, PLLC
 F/K/A SOUTHEAST ANESTHESIOLOGY CONSULTANTS, P.A., AMERICAN
 ANESTHESIOLOGY OF THE SOUTHEAST, PLLC, THE CHARLOTTE-MECKLENBURG
 HOSPITAL AUTHORITY D/B/A CAROLINAS HEALTHCARE SYSTEM D/B/A CAROLINAS
 MEDICAL CENTER, AND MERCY HOSPITAL, INC., DEFENDANTS

No. COA13-1050

Filed 3 June 2014

1. Medical Malpractice—expert testimony—affidavit—standard of care

The trial court erred in a medical malpractice case by granting summary judgment in favor of defendant doctors. Plaintiffs forecasted sufficient evidence to satisfy the requirements of N.C.G.S. § 90-21.12(a). Further, the trial court erred by applying the holding in *Wachovia Mortgage Co.*, 30 N.C. App. 1, to a doctor’s affidavit regarding the applicable standard of care. The case was remanded to the trial court for further proceedings.

2. Agency—respondeat superior—hospital—anesthesiologists—dependent contractors—apparent agency

The trial court did not err in a medical malpractice case by granting summary judgment in favor of hospital defendants on the claim that they were liable under the doctrine of respondeat superior. Plaintiff patient was provided meaningful notice from hospital defendants that the anesthesiologists may be independent contractors. Thus, plaintiffs’ apparent agency arguments also failed.

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3. Medical Malpractice—loss of consortium—summary judgment improperly granted

The trial court erred in a medical malpractice case by granting summary judgment in favor of defendants on plaintiff husband's loss of consortium claim. Because summary judgment was erroneously entered as to plaintiffs' claims of negligence, the loss of consortium claim, which was derivative of the negligence claim, should have survived a motion for summary judgment.

Appeal by plaintiffs from order entered 12 April 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2014.

Van Laningham Duncan PLLC, by Stephen M. Russell, Jr., for plaintiff-appellants.

Parker Poe Adams & Bernstein, LLP, by John H. Beyer, Jami J. Farris, and John D. Branson, for defendants John F. Vullo, M.D., Southeast Anesthesiology Consultants, PLLC, f/k/a Southeast Anesthesiology Consultants, P.A., and American Anesthesiology of the Southeast, PLLC.

Lincoln Derr PLLC, by Tricia M. Derr, for defendants The Charlotte-Mecklenburg Hospital Authority d/b/a/ Carolinas Healthcare System d/b/a Carolinas Medical Center and Mercy Hospital, Inc.

McCULLOUGH, Judge.

Plaintiffs Michele LaFrage Peter and Carl Peter appeal from an order granting summary judgment in favor of defendants John Vullo, M.D., Southeast Anesthesiology Consultants, PLLC f/k/a Southeast Anesthesiology Consultants, P.A., American Anesthesiology of the Southeast, PLLC, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System d/b/a Carolinas Medical Center, and Mercy Hospital, Inc. Based on the reasons stated herein, we reverse in part and affirm in part.

I. Background

Plaintiffs Michele LaFrage Peter ("Ms. Peter") and Carl Peter ("Dr. Peter") are married. On 13 July 2012, plaintiffs filed an amended complaint against defendants John F. Vullo, M.D., Southeast Anesthesiology Consultants, PLLC f/k/a Southeast Anesthesiology Consultants, P.A.,

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American Anesthesiology of the Southeast, PLLC, (collectively “the doctor defendants”), The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System d/b/a Carolinas Medical Center (“CMC”), and Mercy Hospital, Inc. (“CMC Mercy”) (collectively “the hospital defendants”). Plaintiffs’ claims included professional negligence, loss of consortium by Dr. Peter, and *respondeat superior* liability.

Plaintiffs’ complaint alleged the following: In February 2010, Ms. Peter suffered a severe sprain of her right ankle. In June 2010, after several months of physical therapy and two MRIs, Ms. Peter was referred to Dr. Robert Anderson, a foot and ankle specialist with OrthoCarolina in Charlotte, North Carolina. Dr. Anderson recommended surgical intervention and scheduled for it to take place on 22 December 2010 at CMC/CMC Mercy. On 22 December 2010, Ms. Peter underwent surgery at CMC/CMC Mercy. Plaintiffs alleged that defendants induced regional anesthesia in preparation for Ms. Peter’s right ankle arthroscopic surgery. “Ms. Peter was given fentanyl and versed for sedation and remained in ‘conscious sedation’ throughout the procedure.” Dr. Vullo, an employee of Southeast Anesthesiology Consultants, PLLC, f/k/a Southeast Anesthesiology Consultants, P.A. and/or American Anesthesiology of the Southeast, PLLC, was to administer a popliteal nerve block and a saphenous nerve block into an area behind Ms. Peter’s right knee.

Plaintiffs alleged that at some point during the procedure, an unknown female attendant entered the room to assist Dr. Vullo as he was “having problems locating a nerve” to administer the appropriate blocks. Plaintiffs assert that defendants failed to properly administer the nerve blocks and improperly administered repeated needle insertions, resulting in nerve damage. Ms. Peter stated that immediately following the injections, she experienced extreme pain and numbness in her right leg from which she still suffers. The pain and numbness has resulted in her inability to work and conduct day-to-day activities.

The hospital defendants and the doctor defendants filed motions for summary judgment on 25 February 2013 pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The doctor defendants argued that plaintiffs’ complaint was a medical malpractice action as defined by N.C. Gen. Stat. § 90-21.11. The doctor defendants contended that on 10 October 2012, a “Revised Consent Discovery Scheduling Order” was entered. This order set forth a schedule for the designation of expert witnesses and the completion of discovery prior to trial. Pursuant to this order, plaintiffs identified two retained medical expert witnesses that were to testify at trial: Dr. Steven Fiamengo, anesthesiologist of Newberry, South Carolina, and Dr. Robert Friedman, neurologist of Palm

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Beach, Florida. Both doctors were deposed and the doctor defendants argued that plaintiffs “failed to designate a qualified expert witness to offer an opinion that Dr. Vullo deviated from the applicable standard of care.” Furthermore, the doctor defendants argued that plaintiffs could not establish a *prima facie* case of medical malpractice.

On 5 April 2013, plaintiffs filed an affidavit of Dr. Fiamengo in response to defendants’ motions for summary judgment. On 8 April 2013, doctor defendants filed a motion to strike Dr. Fiamengo’s affidavit.

Following a hearing held at the 9 April 2013 term of Mecklenburg County Superior Court, the trial court entered an order granting defendants’ motions for summary judgment and dismissing plaintiffs’ claims with prejudice on 12 April 2013. The trial court also held the following:

The Court declines to strike Dr. Fiamengo’s Affidavit in its entirety, but is aware of and has applied the law as set forth in Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 SE2d 727 (1978) (holding that a party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting the prior sworn testimony of a witness).

From this 12 April 2013 summary judgment order, plaintiffs appeal.

II. Standard of Review

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (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).

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III. Discussion

On appeal, plaintiffs argue that the trial court erred (A) by granting summary judgment in favor of the doctor defendants; (B) in its consideration of Dr. Fiamengo's affidavit; (C) by granting summary judgment in favor of the hospital defendants; and (D) by granting summary judgment as to the loss of consortium claim. Because issues (A) and (B) are closely related, we will address them together.

A. Summary Judgment in favor of the Doctor Defendants

and

B. Affidavit of Dr. Fiamengo

[1] Plaintiffs argue that that trial court erred by granting summary judgment in favor of the doctor defendants where plaintiffs forecast sufficient evidence to satisfy the requirements of a medical malpractice claim pursuant to section 90-21.12(a) of the North Carolina General Statutes. Plaintiffs also argue that the trial court erred in its consideration of Dr. Fiamengo's affidavit. We agree.

N.C. Gen. Stat. § 90-21.12(a) provides as follows:

in any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action[.]

N.C. Gen. Stat. § 90-21.12(a) (2013) (emphasis added). "In order to maintain an action for medical malpractice, a plaintiff must offer evidence to establish (1) the applicable standard of care; (2) breach of that standard; (3) proximate causation; and (4) damages." *Robinson v. Duke Univ. Health Systems*, __ N.C. App. __, __, 747 S.E.2d 321, 334 (2013) (citation omitted).

It is well established that

[b]ecause questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant

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standard of care through expert testimony. Further, the standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice.

Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities.

Smith v. Whitmer, 159 N.C. App. 192, 195-96, 582 S.E.2d 669, 671-72 (2003) (internal citations and quotation marks omitted).

In the case *sub judice*, plaintiffs presented Dr. Fiamengo as their expert witness to testify that the medical care received by Ms. Peter did not comply with the applicable standard of care. Dr. Fiamengo is an anesthesiologist practicing at Crescent Anesthesia Associates, LLC, in South Carolina. Dr. Fiamengo was deposed first on 15 November 2012 and then subsequently provided an affidavit on 5 April 2013. The doctor defendants filed a motion to strike the affidavit, arguing that plaintiffs “served the contradictory affidavit of Dr. Fiamengo in an attempt to create an issue of fact and defeat these Defendants’ Motion for Summary Judgment,” prohibited by North Carolina law.

Our review establishes that during Dr. Fiamengo’s 15 November 2012 deposition testimony, Dr. Fiamengo testified that although he believed Dr. Vullo’s actions amounted to a deviation from the standard of care, he failed to demonstrate that he was familiar with the standard of care in the community where the injury occurred. Rather, Dr. Fiamengo appeared to be applying a national standard of care rather than the “same or similar community” standard required pursuant to N.C. Gen. Stat. § 90-21.12:

[Counsel for the doctor defendants]: Have you arrived at some opinions in this case concerning the standard of care that applied to Dr. Vullo when he performed this peripheral nerve block for Mrs. Peter?

[Dr. Fiamengo]: My opinion is that the nerve injury occurred during the performance of the block, that it should have been recognized with a sonogram, and that injection occurred nevertheless and it resulted in an injury.

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And because of the lack of recognition that the injury occurred — that the injection occurred intraneurally, that that was a deviation from the standard of care.

. . . .

[Counsel for the doctor defendants]: Now with respect to that standard of care opinion, are you taking into consideration in forming that opinion anything about the medical community in Charlotte as it existed in December 2010?

[Dr. Fiamengo]: No

. . . .

[Counsel for the doctor defendants]: So am I right, Dr. Fiamengo, that the standard of care that you're applying to assess Dr. Vullo's care in this case would be a national standard of care?

[Dr. Fiamengo]: Yes.

Dr. Fiamengo's 5 April 2013 affidavit, on the other hand, provided as follows:

8. I have reviewed information about the community of Charlotte, North Carolina, Mecklenburg County, and CMC Mercy Hospital for the period December 2010. I am familiar with the size of the population and economic condition of Charlotte, North Carolina. I am familiar with the level of care and resources available at the hospital, the facilities, and the number of health care providers for anesthesiology.
9. I have worked in communities similar to Charlotte and performed anesthesiology services in a hospital similar in size and resources to CMC Mercy.
10. The standard for performance of popliteal nerve blocks would not differ between my practice and an anesthesiologist in Charlotte, NC, given the similarities between my practice compared to the resources available to CMC Mercy and the experience of Dr. Vullo.
11. I am familiar with the prevailing standard of care for performing popliteal nerve blocks in the same or similar community to Charlotte, North Carolina in

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December 2010 by a physician with the same or similar training, education, and experience as Dr. Vullo.

12. Based on my review of this case, it is my opinion within a reasonable degree of medical certainty that the care of Dr. Vullo provided to Michele Peter was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the . . . performance of Ms. Peter's nerve block in December 2010.
13. The applicable standard in Charlotte in 2010 for an anesthesiologist such as Dr. Vullo required, among other things, that Dr. Vullo recognize and avoid intraneural injections while performing popliteal nerve blocks. Dr. Vullo failed to do so in this case, which directly caused Ms. Peter's injuries.

The trial court stated in its summary judgment order that it declined to strike Dr. Fiamengo's affidavit in its entirety, but noted that it had "applied the law as set forth in Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 SE2d 727 (1978) (holding that a party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting the prior sworn testimony of a witness)."

Plaintiffs argue, and we agree, that the trial court erroneously characterized Dr. Fiamengo's affidavit testimony as a tactic to contradict his own prior deposition testimony, in an attempt to create an issue of fact to defeat defendants' summary judgment motions. Rather, we believe that the circumstances are very similar to the facts found in *Roush v. Kennon*, 188 N.C. App. 570, 656 S.E.2d 603 (2008). In *Roush*, the trial court granted the defendants' motion to strike the plaintiff's proffered expert witness, Dr. Tuzman. The defendants argued, among other things, that Dr. Tuzman was not qualified to offer standard of care opinions because he had no familiarity with Charlotte, North Carolina as required pursuant to Rule 9(j)¹. Specifically, defendants argued that a deposition

1. Rule 9(j) of the North Carolina Rules of Civil Procedure provides for the requirements when pleading medical malpractice:

Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable

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prior to trial established that Dr. Tuzman was not qualified because he had never been to Charlotte, the location where the alleged injury occurred, knew nothing about the dental community in Charlotte, and believed in the existence of a national standard of care for all dentists. *Id.* at 574, 656 S.E.2d at 607. Our Court held that

the record on appeal indicates that subsequent to his deposition, Dr. Tuzman sought to supplement his understanding of the applicable standard of care in the Charlotte metropolitan area by reviewing, *inter alia*, the demographic data for the Charlotte metropolitan area, the Dental Rules of the North Carolina State Board of Dental Examiners, and the deposition of [the defendant] Dr. Kennon regarding the procedures, techniques, and implements which he used while performing a molar extraction on plaintiff. After reviewing these sources, Dr. Tuzman was able to conclude that the standard of care for Atlanta, Georgia (in which he practiced), was the same standard of care that applied to the similar community of Charlotte, North Carolina. . . . Thus, we find that Dr. Tuzman possessed sufficient familiarity with Charlotte and the practice of dentistry therein to testify as to the appropriate standard of care as required by N.C. Gen. Stat. § 90-21.12.

Id. at 576-77, 656 S.E.2d at 607-608.

The record before us indicates that subsequent to giving his deposition, Dr. Fiamengo reviewed information about the community of Charlotte and CMC Mercy for the period of December 2010, became familiar with the population size and economic condition of Charlotte, and became familiar with the level of care and resources available at the hospital, the facilities, and the number of health care providers for anesthesiology. Furthermore, Dr. Fiamengo testified that he had worked in communities similar to Charlotte and performed anesthesiology services in a hospital similar in size and resources to CMC Mercy. He

standard of care under G.S. 90-21.12 shall be dismissed unless: (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2013).

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testified that he was “familiar with the prevailing standard of care for performing popliteal nerve blocks in the same or similar community to Charlotte, North Carolina in December 2010 by a physician with the same or similar training, education, and experience as Dr. Vullo.” Thus, we hold that the trial court erred by applying the holding in *Wachovia Mortgage Co.* to Dr. Fiamengo’s affidavit.

Dr. Fiamengo testified that “[t]he applicable standard in Charlotte in 2010 for an anesthesiologist such as Dr. Vullo required, among other things, that Dr. Vullo recognize and avoid intraneural injections while performing popliteal nerve blocks. Dr. Vullo failed to do so in this case, which directly caused Ms. Peter’s injuries.” Reviewing the evidence in the light most favorable to plaintiffs, plaintiffs offered sufficient evidence of (1) the applicable standard of care, (2) breach of that standard of care, (3) proximate causation, and (4) damages, successful to defeat defendants’ summary judgment motion.

When plaintiffs have introduced evidence from an expert stating that the defendant doctor did not meet the accepted medical standard, [t]he evidence forecast by the plaintiffs establishes a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiff’s injuries. This issue is ordinarily a question for the jury, and in such case, it is error for the trial court to enter summary judgment for the defendant.

Robinson, __ N.C. App. at __, 747 S.E.2d at 335 (citation omitted).

Based on the foregoing reasons, we reverse the order of the trial court granting summary judgment in favor of the doctor defendants and remand to the trial court for further proceedings consistent with this opinion.

C. Summary Judgment in Favor of the Hospital Defendants

[2] Next, plaintiffs argue that there was sufficient evidence to support their claim that the hospital defendants were liable under the doctrine of *respondeat superior*. Plaintiffs argue that “an inference can be drawn that an agency relationship existed between Dr. Vullo and the Hospital Defendants” since CMC and CMC Mercy held themselves out as providing medical services to Ms. Peter under the doctrine of apparent agency. We disagree.

Under the doctrine of *respondeat superior*, a hospital is liable for the negligence of a physician or surgeon acting

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as its agent. There will generally be no vicarious liability on an employer for the negligent acts of an independent contractor. Unless there is but one inference that can be drawn from the facts, whether an agency relationship exists is a question of fact for the jury. If only one inference can be drawn from the facts then it is a question of law for the trial court.

Hylton v. Koontz, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000) (citations omitted).

“[A]pparent agency would be applicable to hold the hospital liable for the acts of an independent contractor if the hospital held itself out as providing services and care.” *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 305, 628 S.E.2d 851, 861 (2006) (citation omitted).

Under this approach, a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees. A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor.

Id. at 307, 628 S.E.2d at 862 (citation omitted).

Plaintiffs compare the facts of the present case to those found in *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 628 S.E.2d 851 (2006), and argue that a jury could decide that Ms. Peter accepted medical services in the reasonable belief that the services were being provided by the hospital defendants. After thoughtful review, we find the facts of the present case distinguishable.

In *Diggs*, the plaintiff filed a medical malpractice action arising out of a gall bladder surgery performed at Forsyth Medical Center (“FMC”). The plaintiff alleged that Forsyth Memorial Hospital, Inc., Novant Health, Inc., and Novant Health Triad Region, L.L.C. were vicariously liable for the negligence of the hospital nursing staff and the team assigned to administer anesthesia to the plaintiff. *Id.* at 292, 628 S.E.2d at 853. The trial court granted summary judgment in favor of the Forsyth Memorial Hospital, Inc., Novant Health, Inc., and Novant Health Triad Region, L.L.C. *Id.* Our Court affirmed summary judgment for Novant Health Inc. and Novant Health Triad Region, L.L.C., but reversed summary judgment as to Forsyth Memorial Hospital, Inc. (“the hospital”). *Id.*

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The *Diggs* plaintiff chose to have Dr. Ismael Goco, who had hospital privileges at FMC, perform her surgery. On 12 October 1999, the plaintiff was admitted to FMC, which is operated by the hospital. The plaintiff's surgery required general anesthesia. Piedmont Anesthesia & Pain Consultants, P.A. ("Piedmont") had a contract with the hospital that granted Piedmont the exclusive right to provide anesthesia services at FMC. *Id.* at 293, 628 S.E.2d at 854. Piedmont employees, Dr. McConville and nurse Sheila Crumb, "were responsible for administering anesthesia to [the] plaintiff through an induction and intubation process. Ms. Crumb performed the intubation, which involved inserting a tube into [the] plaintiff's trachea, under the supervision of Dr. McConville." *Id.* During the plaintiff's procedure, her esophagus was perforated, resulting in injuries. *Id.* The *Diggs* plaintiff argued that she was not aware that Dr. McConville and Ms. Crumb were not employees of the hospital and argued that the hospital was vicariously liable for the negligence of Dr. McConville, Ms. Crumb, and Piedmont. *Id.* at 293-94, 628 S.E.2d at 854. Our Court held that the plaintiff failed to present sufficient evidence to establish a *prima facie* case of actual agency and then turned to the issue of liability based on apparent agency. *Id.* at 301, 628 S.E.2d at 858.

Our Court found that the plaintiff had presented sufficient evidence to meet the test of apparent agency based on the following evidence: (1) the hospital had a Department of Anesthesiology with a Chief of Anesthesiology and a Medical Director, "a fact that a jury could reasonably find indicated to the public that FMC was providing anesthesia services to its patients." *Id.* at 307-308, 628 S.E.2d at 862; (2) the hospital chose to provide anesthesia services by contracting with Piedmont exclusively, with Piedmont doctors serving as the hospital's Chief of Anesthesiology and Medical Director; (3) the plaintiff and other surgical patients had no choice as to who would provide anesthesia services for their operations; and (4) the plaintiff signed a "Consent to Operation and/or Other Procedures" form that was printed on FMC letterhead which distinguished between the plaintiff's personal physician and unnamed anesthesiologists. *Id.* at 308, 628 S.E.2d at 863. Based on the foregoing, our Court held that "[a] jury could decide based on this [consent] form that plaintiff was, through this form, requesting anesthesia services from FMC and that – given the distinction made between plaintiff's personal physician and the unnamed anesthesiologist – plaintiff was accepting those services in the reasonable belief that the services would be provided by the hospital and its employees." *Id.* at 308-309, 628 S.E.2d at 863.

In the case *sub judice*, the record indicates that as of December 2010, Dr. Vullo was not an employee of the hospital defendants. Dr. Vullo

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was an employee of American Anesthesiology of the Southeast, PLLC, which had acquired Southeast Anesthesiology Consultants in October 2010. Dr. Vullo had hospital staff privileges at CMC Mercy and provided anesthesia services to Ms. Peter at CMC Mercy. Nonetheless, our Court has established that “evidence that a physician has privileges at a hospital is not sufficient, standing alone, to make the physician an agent of the hospital[.]” *Id.* at 301, 628 S.E.2d at 859.

Distinguishable from the facts found in *Diggs*, Ms. Peter was provided meaningful notice from the hospital defendants that the anesthesiologists may be independent contractors. In fact, the hospital defendants expressly disclaimed that independent contractors providing certain services at the hospital defendants’ facilities were not agents of the hospital defendants.

In a 11 July 2012 deposition, Ms. Peter testified that prior to her surgery on 22 December 2010, she signed a “Confirmation of Consent for Procedure or Operation” form (“the consent form”) and “Request for Treatment and Authorization Form” (“the authorization form”). The consent form included a clause, right above the signature line, that stated the following:

I UNDERSTAND THAT MY PHYSICIAN, THE ANESTHESIOLOGISTS, RADIOLOGISTS, PATHOLOGISTS, AND OTHER HEALTH CARE PROVIDERS MAY NOT BE EMPLOYED BY OR BE AGENTS OF THE HOSPITAL, AND I AGREE THE HOSPITAL IS NOT RESPONSIBLE OR LIABLE FOR WHAT THEY DO OR FAIL TO DO.

(emphasis added). Furthermore, the authorization form contained a provision entitled “Notice of Independent Contractors” which provided as follows:

I understand that [The Charlotte-Mecklenburg Hospital Authority] has contracted with certain independent professional groups for such groups to exclusively provide certain services at [The Charlotte-Mecklenburg Hospital Authority] facilities, including but not limited to Charlotte Radiology, P.A., *Southeast Anesthesiology Consultants, P.A.*, Carolinas Pathology Group, P.A., Southeast Radiation Oncology Group, P.A., and Emergency Medicine Physicians, P.A. I understand that these professional groups are *independent contractors*, are not employees or agents of [The Charlotte-Mecklenburg Hospital Authority], and are not subject to control or supervision

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by [The Charlotte-Mecklenburg Hospital Authority] in their delivery of professional services.

(emphasis added).

Next, plaintiff argues that the consent and authorization forms are insufficient to defeat plaintiffs' apparent agency claim when contrasting it with the release form found in *Ray v. Forgy*, __ N.C. App. __, 744 S.E.2d 468 (2013). We do not find plaintiffs' arguments persuasive.

In *Ray*, the issue before the Court was whether the plaintiff patient looked to the hospital rather than the individual medical provider, Dr. Forgy, to perform her surgeries. *Id.* at __, 744 S.E.2d at 471. Our Court held that there were no issues of material fact regarding apparent agency where:

[b]efore [the patient's procedures, the patient] signed request for treatment forms. In a section labeled "Designation(s)," she checked the box labeled "Physician" and wrote in "Dr. Forgy." Additionally, [the patient] separately checked a box labeled "Grace Hospital Personnel." [The patient's husband, who is also a plaintiff,] also signed nearly identical consent forms before allowing a catheter to be placed and allowing a drain to be put in his wife's abdomen. This suggests that [the patient] looked to Dr. Forgy separate and distinct from Grace Hospital and its personnel to receive medical treatment.

Id. In addition, our Court found that the release form, in large print just above the signature line, provided explicit notice regarding the employment status of Grace Hospital physicians:

that many of the physicians on the staff of Grace Hospital are not employees or agents of the hospital, but rather, are independent contractors who have been granted the privilege of using its facilities for the care and treatment of patients. . . . My signature below indicates that I have read and understand the above information.

Id.

Plaintiffs contend that the *Ray* release document specifically identified the physician who allegedly violated the standard of care while here, there was "no identification of the treating physician on the [h]ospital [d]efendants' release form, or a quantification of the likelihood of Mrs. Peter being treated by an unidentified non-employee physician."

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However, our review reveals that Ms. Peter's consent form separately listed Dr. Anderson, the foot and ankle specialist of OrthoCarolina, as the physician performing Ms. Peter's operation on 22 December 2010 from the hospital CMC Mercy. As found in *Ray*, this suggests that Ms. Peter looked to Dr. Anderson, separate and distinct from CMC Mercy and its personnel, to receive medical treatment. Although the consent and authorization forms did not identify Dr. Vullo by name, the consent form identified that "anesthesiologists . . . may not be employed by or be agents of the hospital." The authorization form also provided that "certain independent professional groups" were independent contractors and identified a non-comprehensive list of the independent professional groups that included Southeast Anesthesiology Consultants, P.A., a predecessor to Dr. Vullo's employer American Anesthesiology of the Southeast, PLLC. Therefore, comparing the facts of *Ray* and the facts in the case before us, we find them to be more analogous than dissimilar as plaintiffs argue.

Because it is clear from the record that the hospital defendants did not represent or hold out that the providers of Ms. Peter's anesthesia services were agents of the hospital defendants, plaintiffs' apparent agency arguments must fail. See *Holmes v. Univ Health Serv. Inc.*, 205 Ga. App. 602, 603, 423 S.E.2d 281, 283 (1992) (the plaintiff's arguments that an apparent agency relationship existed failed where forms that the plaintiff signed explicitly stated that "[p]hysicians providing medical services within this hospital are not employees of University Hospital. Each physician is an independent contractor"); *Cantrell v. Northeast Ga. Med Ctr.*, 235 Ga. App. 365, 365, 508 S.E.2d 716, 718 (1998) (no holding out by the hospital of the doctor as anything but an independent contractor where a sign over the registration desk advised patients that the doctors were independent contractors and the consent for treatment form also stated that "physicians . . . are not hospital employees, but are independent contractors[.]"); *Compare with Jennison v. Providence St. Vincent Med. Ctr.*, 174 Or. App. 219, 234, 25 P.3d 358, 367 (2001) (finding that it was reasonable for the patient to assume that the radiologist was a hospital employee where nowhere on the consent form did it indicate that the radiologists were independent contractors). We affirm the order of the trial court granting summary judgment in favor of the hospital defendants.

D. Loss of Consortium Claim

[3] Because we hold that summary judgment was erroneously entered as to plaintiffs' claims of negligence against defendant doctors, we also hold that Dr. Peter's loss of consortium claim, derivative of Ms. Peter's

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negligence claim, should have survived a motion for summary judgment. The trial court erred in granting summary judgment in favor of defendants on Dr. Peter's loss of consortium claim.

Reversed in part; affirmed in part.

Judges HUNTER, Robert C. and GEER concur.

GRETCHEN J. PROPST, PLAINTIFF

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

No. COA13-1072

Filed 3 June 2014

Collateral Estoppel and Res Judicata—multiple independent grounds for judgment—preclusive effect as to each issue

The Industrial Commission did not err in a Tort Claims Act case by granting summary judgment in favor of defendant on the grounds of immunity and the public duty doctrine based on collateral estoppel. Where a trial court bases its judgment on multiple independent grounds, each of which have been fully litigated, and that judgment has not been appealed, the trial court's determination as to every issue actually decided has preclusive effect in later litigation.

Appeal by plaintiff from Order entered 18 May 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 2014.

Rabon Law Firm, PLLC by Charles H. Rabon, Jr., and Marshall P. Walker, for plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Olga Vysotskaya, for the State.

STROUD, Judge.

Gretchen Propst ("plaintiff") appeals from an order entered 18 May 2012 by the Full Commission granting summary judgment in favor of the North Carolina Department of Health and Human Services ("defendant"). We affirm.

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I. Background

Plaintiff filed a claim for damages under the Tort Claims Act on 9 September 2008. In that claim, she alleged that Dr. Bruce Flitt, the Gaston County Medical Examiner, negligently failed to perform his duties as medical examiner on 11 September 2005 when he signed a Medical Examiner's Report ("ME Report") that stated he had examined the body of plaintiff's son and included several inaccurate statements regarding her son's body. The ME Report stated that plaintiff's son's body was warm when examined and that he had brown eyes. Plaintiff claimed that these statements caused her substantial emotional distress because her son's eyes were blue and she had been told by the funeral home that her son's body had been stored in a refrigeration unit. She worried that the body she and her family had buried may not have been that of her son.

When they exhumed the body, they discovered that it was in fact plaintiff's son, but that her son had not been dressed in the burial attire she chose. She alleged that this discrepancy shows that Dr. Flitt and his assistants never actually viewed or examined her son's body, in violation of their duties. Plaintiff claimed that the failure of Dr. Flitt and his assistants to perform their duties in examining her son's body caused her severe emotional distress and "post traumatic stress syndrome." She sought \$200,000 in damages.

On 30 July 2010, defendant filed a motion for summary judgment, contending that plaintiff's claim was barred by collateral estoppel because plaintiff had previously filed a negligence action against Dr. Flitt in his official and individual capacities in superior court. The superior court had granted summary judgment in favor of Dr. Flitt on grounds of immunity and the public duty doctrine by order entered 28 April 2010. Plaintiff did not appeal from the superior court's order. Defendant attached the pleadings, motions, and order from the prior suit to its summary judgment motion. Defendant further argued that even if the prior determination by the superior court did not preclude the issue from being contested in the present suit, defendant owed plaintiff no individual duty under the public duty doctrine.

The summary judgment motion was heard by Deputy Commissioner Glenn on 16 August 2010. Deputy Commissioner Glenn entered an order on 6 July 2011 denying defendant's motion for summary judgment. Defendant appealed to the Full Commission on 6 July 2011. The Full Commission granted defendant's motion for summary judgment by order entered 18 May 2012. It concluded that plaintiff's claim was barred by collateral estoppel because the superior court had already determined

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that Dr. Flitt did not owe plaintiff any individual duty. It further concluded that even if it were not barred, plaintiff's claim fails because she has failed to show that Dr. Flitt owed her an individual duty, distinct from his duty to the public. However, due to an apparent clerical error, the order was not served on plaintiff until 28 May 2013. Plaintiff filed written notice of appeal to this Court on 25 June 2013.

II. Standard of Review

The standard of review for an appeal from the Full 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.

Dawson v. N.C. Dept. of Environment and Natural Resources, 204 N.C. App. 524, 527, 694 S.E.2d 427, 430 (2010) (citation and quotation marks omitted).

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is *de novo*.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations, quotation marks, and ellipses omitted).

III. Summary Judgment

The Industrial Commission granted summary judgment in favor of defendant because it concluded that plaintiff's claim was defeated by collateral estoppel and that Dr. Flitt did not owe any duty to plaintiff individually. Plaintiff argues that both of these conclusions were in error.

Collateral estoppel applies when the following requirements are met: (1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated;

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(3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Urquhart v. East Carolina School of Medicine, 211 N.C. App. 124, 128, 712 S.E.2d 200, 204 (citation and quotation marks omitted), *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 389 (2011).¹

An issue is actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and is in fact determined. A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical; if they are not identical, then the doctrine of collateral estoppel does not apply.

Williams v. Peabody, ___ N.C. App. ___, ___, 719 S.E.2d 88, 93 (2011) (citations, quotation marks, brackets, and footnote omitted).

Here, there is no dispute that the prior judgment was a final judgment on the merits,² that the issue of the public duty doctrine was actually litigated and decided in the prior suit, nor that there is sufficient identity of the parties.³ However, plaintiff argues that the superior

1. There has been some confusion in recent years over whether the “mutuality of parties” and privity is still required or not. *See, e.g., In re K.A.*, ___ N.C. App. ___, 756 S.E.2d 837 (2014) (No. COA13-972) (acknowledging the confusion over whether mutuality is still required or not). In any event, as discussed below, there is no dispute that there is sufficient identity of parties for collateral estoppel to apply here.

2. The prior suit was resolved when the superior court granted summary judgment in favor of Dr. Flitt. “In general, a cause of action determined by an order for summary judgment is a final judgment on the merits.” *Williams*, ___ N.C. App. at ___, 719 S.E.2d at 93.

3. Plaintiff’s claims against defendant here are premised on the alleged negligence of Dr. Flitt and those he supervised, imputed to defendant through *respondeat superior*. Therefore, a judgment in favor of Dr. Flitt on the negligence claims bars the same claims being brought against defendant, his employer. *See Urquhart*, 211 N.C. App. at 129, 712 S.E.2d at 204-05 (holding that collateral estoppel applied where the prior judgment involved the plaintiff’s suit against the state employee in his individual capacity and the subsequent suit was brought under the Tort Claims Act); *Kayler v. Gallimore*, 269 N.C. 405, 408, 152 S.E.2d 518, 521 (1967) (“[A] principal or master, sued for damages by reason of the alleged negligence of his agent or servant, may plead, in bar of such action, a judgment in favor of the agent or servant in a former action by or against the present plaintiff, which judgment establishes that the agent or servant was not negligent.”); *Bullock v. Crouch*, 243 N.C. 40, 42, 89 S.E.2d 749, 751 (1955) (“[I]f the judgment in the action against the servant had terminated in favor of servant, since the defendants’ liability was only derivative, no action could have been sustained against the defendants.”)

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court's determination on the public duty issue does not preclude her from contesting that issue in the present suit. She contends that because the superior court granted summary judgment both on the grounds of immunity and on the basis of the public duty doctrine, its determination of the duty issue was not *necessary* to its judgment, and therefore not entitled to preclusive effect.

The Restatement (Second) of Judgments supports plaintiff's position. The Second Restatement drafters comment that "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments § 27, cmt. i (1982). Nevertheless, plaintiff cites no North Carolina case adopting this rule, and we have found none. Other appellate courts around the country have split on whether to adopt this rule or the contrary rule from the First Restatement of Judgments, discussed below. *See Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 251 (3d Cir. 2006) (observing that "[t]here is no consensus among the courts of appeals as to whether the First or Second Restatement offers the better approach").

We decline to follow the approach of the Second Restatement as to this issue because it is incompatible with the doctrine of collateral estoppel as it has been applied in this state.⁴ The Second Restatement drafters explain their decision to give neither basis of a judgment with alternative bases preclusive effect as follows:

First, a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. Second, and of critical importance, the losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other one not even reached.

Id.

We are not convinced that these policy rationales justify a departure from the general rule that issues actually litigated and determined in a prior action preclude later relitigation of those issues. We have said that

4. The Restatements are persuasive, not binding authority, "[e]xcept as specifically adopted in this jurisdiction." *Hedrick v. Rains*, 344 N.C. 729, 729, 477 S.E.2d 171, 172 (1996).

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the prior judgment serves as a bar only as to issues actually litigated and determined in the original action. An issue is 'actually litigated,' for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and is in fact determined.

City of Asheville v. State, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008) (citations, quotation marks, brackets, and emphasis omitted), *app. dismissed and disc. rev. denied*, 363 N.C. 123, 672 S.E.2d 685 (2009). Under the rule urged by plaintiff and the Second Restatement, the parties could fully litigate two issues, either of which could independently support the trial court's judgment, but neither of which would have preclusive effect in a later case. A party would be free to relitigate either issue in a future case.

The First Restatement of Judgments suggests the opposite conclusion. The drafters of the First Restatement noted that when there are multiple independent grounds for a trial court's judgment, "it must be said either that both are material to the judgment or that neither is material." Restatement (First) of Judgments § 68, cmt. n (1942). They observed that "[i]t seems obvious that it should not be held that neither is material, and hence both should be held to be material." *Id.*

While this conclusion may not be *obvious*, as evidenced by the contrary conclusion in the later Restatement, we agree that both independent grounds of a prior judgment should have later preclusive effect, assuming all of the other elements of collateral estoppel are present. As the drafters of the Second Restatement recognized, "[t]he cases on this question of effect of alternative determinations are not numerous, and some are unclear in their rationale [T]he question is a close and difficult one." Restatement (Second) of Judgments § 27, Reporter's Note. To hold that a prior judgment is not preclusive on either ground on which it was based would undermine the entire purpose of the collateral estoppel doctrine, to "protect[] litigants from the burden of relitigating previously decided matters and promot[e] judicial economy by preventing needless litigation." *City of Asheville*, 192 N.C. App. at 17, 665 S.E.2d at 117 (citation and quotation marks omitted).

The illustration given by the drafters of the First Restatement explains why they came to this conclusion:

A brings an action against B to recover interest on a promissory note payable to A, the principal not yet being due.
B alleges that he was induced by the fraud of A to execute

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the note, and further alleges that A gave him a release under seal of the obligation to pay interest. The jury in answer to interrogatories finds that B was induced by A's fraud to execute the note, and also finds that A had given him a release under seal of the obligation to pay interest, and gives a verdict for B on which judgment is entered. After the note matures A brings an action against B for the principal of the note. The prior judgment is a defense to the action, since the finding that the execution of the note was procured by fraud is conclusive.

Restatement (First) of Judgments § 68, illus. 7. The Second Restatement uses this same illustration, but comes to the opposite conclusion. Restatement (Second) of Judgments § 27, illus. 15. Under the latter analysis, B would have had to relitigate the issue of fraud, as neither of the previous determinations would have preclusive effect. This result defeats the purpose of collateral estoppel previously discussed.

Additionally, this state's analysis as to what constitutes *dicta* supports the adoption of the rule of the First Restatement over that of the Second. The Second Restatement considered alternative grounds that support a judgment to be the equivalent of *dicta*. See Restatement (Second) of Judgments § 27, cmt. i. However, alternative, independent grounds for an appellate decision are not considered *obiter dicta* here. The Supreme Court has held that

where a case actually presents two or more points, any one of which is sufficient to support decision, but the reviewing Court decides all the points, the decision becomes a precedent in respect to every point decided, and the opinion expressed on each point becomes a part of the law of the case on subsequent trial and appeal.

Hayes v. City of Wilmington, 243 N.C. 525, 537, 91 S.E.2d 673, 682 (1956).

Moreover, we are not convinced that the possibility that the trial court erroneously decided one of the multiple grounds relied on outweighs the interests of judicial economy and the prevention of unnecessary relitigation. Our Supreme Court has explained that the doctrine of collateral estoppel applies even if the prior judgment may have been error:

To be valid a judgment need not be free from error. Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding

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res judicata and collateral estoppel effect in all courts, Federal and State, on the parties and their privies.

King v. Grindstaff, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973). Therefore, we hold that where a trial court bases its judgment on multiple independent grounds, each of which have been fully litigated, and that judgment has not been appealed, the trial court's determination as to every issue actually decided has preclusive effect in later litigation.

Here, all elements of collateral estoppel are present. First, the issues involved in the present action are the same as those in the prior action. The issue of whether Dr. Flitt owed a duty to plaintiff is vital to plaintiff's negligence claim against defendant here, as it was in her claim against Dr. Flitt. Second, the issue of whether the public duty doctrine defeated the duty element of plaintiff's negligence claim was raised and actually litigated in the prior action. In Dr. Flitt's answer, he specifically pled the public duty doctrine as a defense. Plaintiff specifically and extensively briefed the issue of the public duty doctrine in her memorandum in opposition to Dr. Flitt's summary judgment motion in the superior court action. Further, the superior court specifically noted that Dr. Flitt was "entitled to summary judgment based on the public duty doctrine." Third, the issue of whether Dr. Flitt owed a duty to plaintiff was material to deciding plaintiff's negligence claim against him. *See Ray v. North Carolina Dept. of Transp.*, 366 N.C. 1, 5, 727 S.E.2d 675, 679 (2012) ("Because the public duty doctrine says that there is a duty to the public generally, rather than a duty to a specific individual, the doctrine operates to prevent plaintiffs from establishing the first element of a negligence claim—duty to the individual plaintiff."). Finally, as we held above, because the public duty doctrine was specifically relied on to support the trial court's judgment, and it alone could have supported the trial court's judgment, that issue was necessary and essential to the judgment.

We conclude that the superior court's summary judgment order collaterally estops plaintiff to contest the issue of the public duty doctrine. As a result, plaintiff cannot show that any duty was owed to her individually and her negligence claim against defendant must fail. *See Ray*, 366 N.C. at 5, 727 S.E.2d at 679. Therefore, we affirm the Industrial Commission's order granting defendant's motion for summary judgment.

IV. Conclusion

For the foregoing reasons, we conclude that plaintiff is precluded from contesting the issue of whether the public duty doctrine applies. Therefore, plaintiff cannot show that defendant or its employee, Dr.

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Flitt, owed her any individual duty and her negligence claim fails as a matter of law. We accordingly affirm the Full Commission's order granting summary judgment to defendant.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

ELIZABETH McDUFFIE RUDDER, PLAINTIFF
v.
WILLIAM OVERTON RUDDER, DEFENDANT

No. COA13-424

Filed 3 June 2014

1. Domestic Violence—ex parte protective order—findings of fact—pre-printed form—minimally sufficient

The trial court did not err by entering an ex parte domestic violence protective order (DVPO) against defendant. The court's findings of fact marked on a pre-printed form were minimally sufficient to support its conclusions that defendant committed acts of domestic violence against plaintiff and that it clearly appeared that there was a danger of acts of domestic violence against plaintiff. The trial court's failure to mark the first box of Finding 2 was merely a clerical error.

2. Domestic Violence—one-year protective order—ex parte order expired—court lacked authority

The trial court erred by entering a one-year domestic violence protection order (DVPO) after an ex parte DVPO had been in effect for more than 18 months, but then expired without being renewed. The trial court did not have authority to enter the one-year DVPO that was based upon the same complaint as the ex parte DVPO.

Appeal by defendant from orders entered 23 November 2010 by Judge L. Walter Mills and 28 September 2012 by Judge Kirby Smith in Carteret County District Court. Heard in the Court of Appeals 23 September 2013.

No brief filed on behalf of plaintiff-appellee.

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Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson, for defendant-appellant.

GEER, Judge.

Defendant William Overton Rudder appeals from an ex parte domestic violence protection order entered 23 November 2010 (“the ex parte DVPO”) and a one-year DVPO entered 28 September 2012 (“the September 2012 DVPO”). Defendant primarily contends that the trial court erred in entering the September 2012 DVPO after the ex parte DVPO was in effect for more than 18 months, but then expired without being renewed. We hold that because at the time the ex parte DVPO expired without being renewed, it had been in effect for more than a year, the trial court did not have authority to enter the September 2012 DVPO that was based upon the same complaint. We, therefore, vacate the September 2012 DVPO. Because, however, we find defendant’s arguments regarding the ex parte DVPO unpersuasive, we affirm that order.

Facts

On 23 November 2010, plaintiff Elizabeth McDuffie Rudder filed a complaint and motion for a DVPO against defendant, her husband. Plaintiff had permanently moved out of the marital home 14 November 2010. Plaintiff’s verified complaint alleged:

On November 1, 2010, I confronted Defendant about having an extra-marital affair. Defendant threw me on a couch, jumped on top of me and fractured my rib with his knee. The injury was documented by a physician. Defendant has attacked me physically on numerous occasions over the course of many years, including hitting me, throwing me on the floor and shoving me. Defendant encouraged me to kill myself by putting a gun in front of me and telling me to pull the trigger. Defendant has pointed a gun at me and said “click.” Defendant has threatened to kill me and my immediate family.

The trial court entered an ex parte DVPO on the same day that plaintiff filed her complaint. The order found that defendant had committed acts of domestic violence against plaintiff, that there was a danger of future acts of domestic violence against plaintiff, and that defendant’s conduct required that he surrender all firearms, ammunition, and gun permits. A “Notice of Hearing on Domestic Violence Protective Order” was issued, which scheduled a hearing on 6 December 2010 for the

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purpose of determining “*whether the [23 November 2010 ex parte] Order will be continued.*”¹ (Emphasis added.)

Thereafter, approximately 13 orders were entered continuing the hearing on the ex parte DVPO. The first continuance order was entitled “ORDER CONTINUING DOMESTIC VIOLENCE HEARING AND EX PARTE ORDER” and noted that “[t]his matter was scheduled for hearing for emergency relief pursuant to G.S. 50B-2.”² This order also provided, in pre-printed text, that “this hearing is continued to the date and time specified below to allow for proper service upon the defendant.” However, it is not contested that defendant was actually served on 23 November 2010, so it appears that this form was used for convenience, with little regard for its substantive content. In handwriting, the order stated that “[t]he parties agree to continue this matter to resolve the marital issues without prejudice to either party. The parties agree to not dissipate the marital assets except for reasonable living expenses.” The order further specified that “[t]he Court orders that the ex parte order entered in this case is continued in effect until the date of the hearing set above.”

Nearly all of the other continuance orders were on the same form and contained the same pre-printed language that the hearing was being continued to allow time for service on the defendant. Some of the continuance orders further identified, in handwriting, the reason for the continuances as being, for example, to allow, by consent, the parties time to “resolve the marital issues”; by consent, to address matters in other pending litigation involving the parties; based upon secured leave by counsel; and because of the inability of the trial court to hear the matter due to other cases on the calendar.

The final continuance order entered 17 May 2012 was on the same form and included the same language as the first continuance order: “This matter was scheduled for hearing for emergency relief pursuant to G.S. 50B-2.” This order scheduled a hearing for 9:30 a.m. on 4 June 2012. On 4 June 2012, however, no hearing took place, the trial court did not enter an additional continuance, and the court did not renew the existing ex parte DVPO. The ex parte DVPO, therefore, expired on 4 June 2012.

1. This order was on the form entitled “NOTICE OF HEARING ON DOMESTIC VIOLENCE PROTECTIVE ORDER,” AOC-CV-305, Rev. 6/2000 Administrative Office of the Courts.

2. This order was on the form entitled “ORDER CONTINUING DOMESTIC VIOLENCE HEARING AND EX PARTE ORDER,” AOC-CV-316, Rev. 12/04.

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On 6 June 2012, defendant filed a motion pursuant to N.C. Gen. Stat. § 50B-3.1(f), requesting return of firearms seized from him pursuant to the *ex parte* DVPO. On 7 June 2012, plaintiff filed a Rule 60 motion, seeking relief from the 17 May 2012 continuance order “on the grounds of excusable neglect, clerical error, and mistake in that the date set for hearing this matter was explicitly intended to be heard during the June 4, 2012 *term* of court as opposed to the specific day of June 4, 2012.” The record contains no indication that the trial court ever ruled on plaintiff’s Rule 60 motion. Defendant, however, subsequently filed additional motions for return of his firearms on 12 June 2012 and 21 June 2012, using a *pro se* form.

The trial court calendared hearings on 31 August 2012 and 21 September 2012 to address various discovery-related motions in a related but separate divorce proceeding, as well as defendant’s motion for return of firearms. At the hearing, plaintiff conceded that the *ex parte* DVPO had expired, but requested that the trial court nonetheless enter a one-year DVPO³ based upon the underlying complaint. The trial court allowed plaintiff to present evidence to support the issuance of a one-year DVPO at the 31 August 2012 hearing. Defendant presented his evidence at the hearing on 21 September 2012.

On 28 September 2012, the trial court entered a one-year DVPO, finding that defendant had, nearly two years earlier, intentionally caused bodily injury to the plaintiff, placed her in fear of imminent serious bodily injury, and placed her in fear of continued harassment that rose to such a level as to inflict substantial emotional distress. Specifically, the trial court found:

On November 1, 2010, the defendant shoved the plaintiff down on a couch and jumped on top of her. The defendant threatened to kill the plaintiff and her immediate family. The defendant pointed a gun at the plaintiff and informed her he could kill her without anyone ever knowing. The

3. N.C. Gen. Stat. § 50B-3 (2013) provides that “[p]rotective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year.” We first note that this subsection, taken in context, clearly refers only to a DVPO entered after service of process and a hearing held after notice to the defendant, even though the general term “protective order” is used. N.C. Gen. Stat. § 50B-2 (2013) specifically addresses “temporary orders” and provides for a limited duration of an *ex parte* DVPO of 10 days, unless the *ex parte* order is continued by the trial court. We are, therefore, referring to this DVPO as a “one-year DVPO” to distinguish it from the *ex parte* DVPO, although we recognize that a DVPO entered after service and notice to the defendant could be entered for a fixed period of time less than one year.

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defendant placed a gun in front of the plaintiff and told her to pull the trigger and kill herself. Over the course of the marriage, the defendant physically assaulted the plaintiff and committed further acts of domestic violence.

Based on its findings, the trial court concluded that the “defendant has committed acts of domestic violence against the plaintiff,” that “[t]here is danger of serious and immediate injury to the plaintiff,” and that “[t]he defendant’s conduct requires that he[] surrender all firearms, ammunition and gun permits.” The court entered a DVPO effective for one year. Defendant timely appealed both the *ex parte* DVPO and the September 2012 DVPO to this Court.

Discussion

Initially, we note that the *ex parte* DVPO expired 4 June 2012, and the one-year DVPO was set to expire 28 September 2013, five days after this case was heard by this Court. This appeal is not, however, moot. *See Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (holding that defendant’s appeal of expired DVPO was not moot because of “stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse[.]” and “the continued legal significance of an appeal of an expired domestic violence protective order” (quoting *Piper v. Layman*, 125 Md. App. 745, 753, 726 A.2d 887, 891 (1999))).

As explained in *Smith*, “there are numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable. For example, . . . ‘a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a [domestic violence protective order].’” *Id.* (quoting *Piper*, 125 Md. App. at 753, 726 A.2d at 891). We, therefore, may properly review both the *ex parte* DVPO and the September 2012 DVPO.

I

[1] In reviewing the *ex parte* DVPO entered 23 November 2010, we determine “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. Where there is competent evidence to support the trial court’s findings of fact, those findings are binding on appeal.” *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (quoting *Burress v. Burress*, 195 N.C. App. 447, 449-50, 672 S.E.2d 732, 734 (2009)).

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Defendant argues (1) that the trial court's findings of fact were insufficient to support its conclusion that "defendant has committed acts of domestic violence against the plaintiff" and (2) that specific facts do not support its conclusion that "it clearly appears that there is a danger of acts of domestic violence against the plaintiff." We disagree.

The trial court used pre-printed form AOC-CV-304, Rev. 8/09, entitled "EX PARTE DOMESTIC VIOLENCE ORDER OF PROTECTION" for its order. The form contains 12 pre-printed "Additional Findings." Before each numbered finding is a box corresponding to the finding as a whole. Some of the pre-printed findings contain subparts with additional boxes to check, blank spaces to fill in, or space to provide additional information.

In this case, the trial court made the following relevant findings of fact by marking the boxes next to certain pre-printed provisions and adding the information set out below in italics:

2. That on . . . *11-01-2010*, the defendant
- a. . . . intentionally caused bodily injury to the plaintiff . . .
 - b. placed in fear of imminent serious bodily injury the plaintiff a member of the plaintiff's family a member of the plaintiff's household
 - c. placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress the plaintiff a member of plaintiff's family a member of plaintiff's household
-
3. The defendant is in possession of, owns or has access to firearms, ammunition, and gun permits described below. . . .
- The Defendant is in possession of hundreds of firearms and approximately 1000 boxes of ammunition which are spread through the marital residence.*
4. The defendant

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- [x] a. . . . [x] threatened to use a deadly weapon against the [x] plaintiff . . .
- [x] b. has a pattern of prior conduct involving the . . . [x] threatened use of violence with a firearm against persons
- [x] c. made threats to seriously injure or kill the [x] plaintiff . . .
-
- [x] e. inflicted serious injuries upon the [x] plaintiff . . . in that . . . :

Broken [sic] her rib.

(Emphasis added to indicate information added by trial court to form.)

Defendant argues that by failing to mark the first box of Finding 2, which corresponds to Finding 2 as a whole, the trial court did not actually intend to make any of the findings marked under paragraph 2. It is apparent, however, that this omission was merely a clerical error.

“‘Clerical error’ has been defined . . . as: ‘An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.’” *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Black’s Law Dictionary* 563 (7th ed. 1999)). Clerical errors include mistakes such as inadvertently checking the wrong box on pre-printed forms. See *In re D.D.J., D.M.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006).

Finding 2 on Form AOC-CV-304 corresponds to the definition of domestic violence set out in N.C. Gen. Stat. § 50B-1(a), which provides:

(a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

- (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

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- (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
- (3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

The statute thus specifies several alternative ways in which one may commit an act of domestic violence.

The subparts of Finding 2 on Form AOC-CV-304 set out all the possible alternative findings that could support a finding of fact that the defendant committed an act of domestic violence. The form allows the trial court to indicate which alternatives apply by marking the relevant subparts. Thus, by checking the box next to Finding 2, the trial court indicates an ultimate finding of fact: that defendant committed an act of domestic violence. By marking the boxes next to the subparts of Finding 2, the trial court then provides more specific findings regarding how the defendant committed an act of domestic violence and against whom.

Here, the trial court provided the "date of most recent conduct" in the first line of Finding 2 and marked the subparts indicating what acts the defendant committed and against whom. Additionally, the trial court concluded as a matter of law that the defendant committed acts of domestic violence against the plaintiff. Under these circumstances, it is apparent that the trial court intended to mark the box next to Finding 2 and that its failure to do so was inadvertent and merely a clerical error. The error should, however, be corrected on remand. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999))).

Defendant next argues that even if it is presumed that the trial court intended to mark Finding 2, the trial court's findings of fact are still insufficient. An ex parte DVPO may be issued "if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party" N.C. Gen. Stat. § 50B-2(c)(1). This Court has interpreted this provision to mean that "in order to issue an ex parte DVPO, the trial court must make findings of fact which include 'specific facts' which demonstrate 'that there is

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a danger of acts of domestic violence against the aggrieved party[.]” *Hensey*, 201 N.C. App. at 61, 685 S.E.2d at 546 (quoting N.C. Gen. Stat. § 50B-2(c)). Defendant argues that the ex parte DVPO in this case does not contain the required “specific facts.”

In *Hensey*, the ex parte DVPO, which also was a pre-printed form order, did not itself set forth specific findings of facts in the DVPO, but rather appeared to incorporate by reference the allegations of the complaint. *Id.* at 62, 685 S.E.2d at 546. This Court concluded that “while it would be preferable for the trial court to set forth the ‘specific facts’ which support its order separately, instead of by reference to the complaint, the ex parte DVPO, read in conjunction with plaintiff’s complaint, does provide sufficient information upon which we may review the trial court’s decision to issue the ex parte DVPO.” *Id.* at 64, 685 S.E.2d at 547.

In reaching its conclusion, the Court in *Hensey* rejected the defendant’s argument that the ex parte DVPO must comply with Rule 52 of the Rules of Civil Procedure, which requires that a trial court sitting without a jury shall “find the facts specially.” *Id.* at 62-63, 685 S.E.2d at 546-57. The Court concluded that ex parte orders under N.C. Gen. Stat. § 50B-2 “need not contain findings and conclusions that fully satisfy the requirements of [Rule 52]” because such a requirement “would be inconsistent with the fundamental nature and purpose of an ex parte DVPO, which is intended to be entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm.” 201 N.C. App. at 63, 685 S.E.2d at 547.

Here, in the space provided under Finding 2, the DVPO neither includes specific facts nor references the allegations of the complaint, although Finding 2 does specify the date of the most recent conduct by defendant. In addition, however, Finding 4 finds that defendant had threatened to use a deadly weapon against plaintiff, had a pattern of prior conduct involving the threatened use of violence with a firearm, had made threats to seriously injure the plaintiff, and had inflicted serious injuries on plaintiff by breaking her rib. While defendant argues that Finding 4 does not indicate whether defendant intentionally broke plaintiff’s rib, that finding is included in Finding 2.

We hold that the combination of Finding 2 and Finding 4 are minimally adequate to supply the required “specific facts” necessary to support the conclusion that the defendant committed acts of domestic violence against the plaintiff and that “there is a danger of acts of domestic violence against the plaintiff.” We, therefore, affirm the ex parte DVPO. We note, however, that the better practice would be to

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include more specific facts under Finding 2 explaining the basis for the ultimate findings made by checking the boxes on the pre-printed form.

II

[2] Defendant next contends that the trial court erred by entering the September 2012 DVPO when the ex parte DVPO had expired after being in effect for more than a year. We agree.

In this case, the ex parte DVPO continued in effect for more than 18 months until it expired on 4 June 2012. We question whether the General Assembly intended for an ex parte DVPO to continue in effect for this length of time based on repeated continuances – in this case, a total of 13. *See* N.C. Gen. Stat. § 50B-2(c)(5) (“Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. *A continuance shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown.* The hearing shall have priority on the court calendar.”⁴ (Emphasis added)). We need not, however, specifically address that issue in order to resolve this appeal.

The North Carolina Domestic Violence Act, set out in Chapter 50B of the General Statutes, specifies the procedural framework for the issuance of DVPOs. The statute defines a “protective order” as “any order entered pursuant to this Chapter upon hearing by the court or consent of the parties.” N.C. Gen. Stat. § 50B-1(c). As this Court explained in *State v. Poole*, 228 N.C. App. 248, 255, 745 S.E.2d 26, 32, *appeal dismissed and disc. review denied*, 367 N.C. 255, 749 S.E.2d 885 (2013), because an ex parte DVPO is entered following a hearing, the phrase “protective order” when used in Chapter 50B encompasses both ex parte DVPOs and one-year DVPOs. Although the types of protection the two kinds of orders can provide are essentially the same, there are necessarily some procedural differences between an ex parte DVPO and a one-year DVPO.

As noted in *Hensey*, an ex parte DVPO “is intended to be entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm.” 201 N.C. App. at 63, 685 S.E.2d at 547. In contrast, the one-year DVPO is entered

4. The emphasized portion of this provision was added 1 October 2012 and is applicable to actions and motions filed on or after that date. 2012 N.C. Sess. Law 20 §§ 1, 3. Therefore, it is not applicable to this case. Nevertheless, it is indicative of the General Assembly’s current intent to limit the length of time an ex parte DVPO may continue in effect.

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only after notice to the defendant and an opportunity to participate in a full adversarial hearing. *Id.* at 61, 685 S.E.2d at 545. It is intended to address issues for a longer time period, although normally not more than three years, with temporary custody provisions limited to one year. *See* N.C. Gen. Stat. § 50B-3(b).

Unfortunately, Chapter 50B does not clearly distinguish between some of the characteristics of an *ex parte* order and a DVPO entered after notice to the defendant and an opportunity for a full adversarial hearing. However, reading the entire Chapter in context, it is apparent that N.C. Gen. Stat. § 50B-2 addresses the procedure and time limitations for *ex parte* or temporary orders, while the substantive protective provisions of any type of protective order are addressed by N.C. Gen. Stat. § 50B-3, and the time limitations of the one-year DVPO are addressed by N.C. Gen. Stat. § 50B-3(b).⁵

N.C. Gen. Stat. § 50B-3(b) specifies what relief a “protective order” may grant and, with respect to the time limitations for the one-year DVPO, provides:⁶

Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order; provided, however, that a temporary award of custody entered as part of a protective order may not be renewed to extend a temporary award of custody beyond the maximum one-year period. The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed.

5. It would be absurd to read the provision of N.C. Gen. Stat. § 50B-3(b) that “protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year” as applying to an emergency order under N.C. Gen. Stat. § 50B-2(b) or an *ex parte* order under N.C. Gen. Stat. § 50B-2(c), since those sections include specific time requirements applicable to those orders. It would seem obvious that the statute would not permit the court to enter an *ex parte* order that lasted for a full year. But, as noted above, N.C. Gen. Stat. § 50B-1(c) (2013) also defines the term “protective order” broadly, to include “any order entered pursuant to this Chapter upon hearing by the court or consent of the parties.”

6. The *ex parte* DVPO’s time limitations are specifically addressed by N.C. Gen. Stat. § 50B-2(b) and (c).

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In this case, we are addressing the plaintiff's request for the trial court to enter a one-year DVPO based upon an *ex parte* DVPO that had already remained in effect for more than a year based upon continuances of the hearing. Even if we assume, without deciding, that an *ex parte* DVPO may lawfully continue for more than a year through the mechanism of repeated continuances, in this case, the *ex parte* DVPO ultimately expired on 4 June 2012 when no order was entered continuing the *ex parte* DVPO in effect after that date.

We also note that N.C. Gen. Stat. § 50B-3(b) provides that even for the renewal of a one-year DVPO, the motion for renewal must be filed *before the expiration* of the existing order. When the motion to renew is filed prior to expiration of the one-year DVPO, the plaintiff must show "good cause" although the plaintiff need not show commission of an additional act of domestic violence after the entry of the original DVPO. This language implies that where even a one-year DVPO has expired, the plaintiff would need to allege and prove commission of an additional, more recent act of domestic violence to obtain a new order. That is, the plaintiff can rely upon the original acts that formed the basis for the issuance of the original *ex parte* DVPO and/or one-year DVPO for a limited time. Of course, the plaintiff is not prevented in any way from seeking a new DVPO in the event of new and additional acts of domestic violence, but the renewal and extensions of a DVPO based upon a particular act are limited by the statute.

The DVPO at issue here is clearly and exclusively based upon an act that occurred prior to the expiration of the *ex parte* order. The orders continuing the hearing on the *ex parte* order, including the one that set the matter for 4 June 2012, had scheduled the case "for hearing for emergency relief pursuant to G.S. 50B-2" — and not for entry of an independent order under N.C. Gen. Stat. § 50B-3. The orders referred back to the original *ex parte* order by noting that "[t]he Court orders that the *ex parte* order entered in this case is continued in effect until the date of the hearing set above." Ultimately, the *ex parte* order then expired by its own terms.

Applying N.C. Gen. Stat. § 50B-3(b), the *ex parte* DVPO had already been in effect for more than one year (the maximum permissible length of time even for a DVPO entered upon a full adversarial hearing under N.C. Gen. Stat. § 50B-2(c)(5)). We also note that no one-year DVPO that was subject to *renewal* under N.C. Gen. Stat. 50B-3 had ever been entered. Based upon the orders entered continuing the *ex parte* DVPO and setting this matter for hearing, upon expiration of the *ex parte* order after more than a year, the trial court no longer had jurisdiction under the original complaint to enter an order further extending the DVPO.

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We note that this situation is distinguished from a case in which a plaintiff files a civil action or motion seeking a DVPO, but either because the plaintiff did not request an immediate ex parte order or because the trial court declined to issue an immediate ex parte order, the trial court has not entered an ex parte order and has scheduled a hearing upon the complaint or motion to consider issuance of a DVPO *after* service of process and notice of hearing to the defendant, under N.C. Gen. Stat. § 50B-2(b) (emphasis added):

A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, *where no ex parte order is entered*, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

In fact, Form AOC-CV-305, Rev. 6/2000 has pre-printed language to provide notice of a hearing to the defendant in just that situation:

2. A hearing will be held before a district court judge at the date, time and location indicated below. At that hearing it will be determined whether emergency relief in protecting the plaintiff and the plaintiff's child(ren) should be granted.

This option was not checked in this case since an ex parte order was entered, and the first option, as noted above, was checked instead.

This case also does not present the issue whether a hearing upon a domestic violence complaint or motion, when no ex parte order was entered, could be continued repeatedly, even for more than a year, and we do not address that situation. In the case before us, plaintiff and the trial court proceeded as directed by the ex parte order issued under N.C. Gen. Stat. § 50B-2(c). As noted above, the ex parte DVPO was properly entered, remained in effect for 18 months by serial continuances of the

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order, and then expired by its own terms. Thus, we hold that when an ex parte DVPO expires beyond the time limitations of N.C. Gen. Stat. § 50B-3(b) for a one-year DVPO without a motion to renew, the trial court no longer has authority to enter an order effectively further extending the expired DVPO, as the trial court would also be unable to extend even a one-year DVPO in this situation without a motion to renew.⁷

Because the trial court, in this case, lacked authority to enter the September 2012 order after the ex parte DVPO expired more than 18 months after its original entry, we vacate the September 2012 DVPO and remand for a hearing on defendant's motion for return of firearms. Because of our disposition of this appeal, we need not address defendant's remaining arguments regarding the September 2012 DVPO.

Affirmed in part, vacated in part, and remanded in part.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
MAX TRACY EARLS, DEFENDANT

No. COA13-1128

Filed 3 June 2014

1. Evidence—testimony—minor child sex abuse victim—leading questions—fair opportunity to cross-examine

The trial court did not err in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by allowing the prosecution to ask the 14-year-old victim leading questions, nor did it violate defendant's rights under the Sixth and Fourteenth Amendments. Leading questions were necessary to develop the witness's testimony. Further, the victim testified in open court and defendant had a full and fair opportunity to cross-examine her.

7. As plaintiff here did not file a motion to renew under N.C. Gen. Stat. § 50B-3(b), we do not address whether an ex parte DVPO is actually subject to renewal in this manner, nor do we mean to suggest that it could be, particularly given the limitations of N.C. Gen. Stat. § 50B-2(c)(5).

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2. Appeal and Error—preservation of issues—failure to cite authority

Although defendant contended that the trial court erred in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by allowing the prosecutor to read the younger victim's written statement to the jury, defendant waived this argument under N.C.R. App. P. 28(b)(6) by failing to cite any authority.

3. Appeal and Error—preservation of issues—failure to object—failure to argue plain error

Although defendant contended that the prosecutor improperly vouched for the younger victim's credibility by reading her statement to the jury in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case, he failed to preserve this issue by failing to object on this basis below and failing to argue plain error.

4. Appeal and Error—preservation of issues—failure to raise issue at trial—discretionary decisions not subject to plain error review

Although defendant contended that the trial court erred in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by concluding that the younger victim was competent to testify, defendant never raised this issue below and discretionary decisions of the trial court are not subject to plain error review.

5. Constitutional Law—effective assistance of counsel—failure to object

Defendant did not receive ineffective assistance of counsel based on defense counsel's failure to object to the introduction of a videotaped interview of a minor victim in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case. Out-of-court statements offered to corroborate a child's testimony regarding sexual abuse have been held to be non-hearsay and thus admissible.

6. Constitutional Law—due process—quoting Bible during sentencing

The trial court did not violate defendant's right to due process by quoting the Bible during sentencing. While the trial court should not have referenced the Bible or divine judgment in sentencing,

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defendant cannot show that his rights were prejudiced in any way or that his sentence was based on the trial court's religious invocation.

Appeal by defendant from Judgments entered on or about 18 April 2013 by Judge Richard D. Boner in Superior Court, Catawba County. Heard in the Court of Appeals 6 March 2014.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Amar Majmundar, for the State.

M. Alexander Charms, for defendant-appellant.

STROUD, Judge.

Max Earls (“defendant”) appeals from judgments entered after a Catawba County jury found him guilty of three counts of taking indecent liberties with a child, two counts of incest, one count of statutory rape, and one count of rape of a child by an adult. We conclude that there was no error at defendant's trial or sentencing.

I. Background

On or about 11 July 2011, defendant was indicted on three counts of taking indecent liberties with a child, two counts of incest, one count of statutory rape, and one count of rape of a child by an adult. Defendant pled not guilty and was tried by jury the week of 15 April 2013.

At trial, the State's evidence tended to show that in mid-to-late 2010, defendant was living with his wife and three daughters, Kate, Ellen, and Carol,¹ in Catawba County, NC. At the time, Kate was 13, Ellen was 11, and Carol was approximately 2. Kate and Ellen both testified at trial. Kate testified that defendant had sexually abused her by forcing her to engage in both vaginal and anal intercourse. Ellen testified that defendant made her take her clothes off and got into bed naked with her. She could not say aloud what he did to her after that, but while she was on the witness stand the prosecutor had her write down what happened. Ellen wrote that defendant had put his penis in her vagina. After the State rested, defendant presented his own evidence and testified on his own behalf. He denied that he ever touched his daughters inappropriately and claimed that they made up the story.

1. To protect the identities of the juveniles and for ease of reading we will refer to them by pseudonym.

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The jury found defendant guilty of all charges. The trial court then consolidated the charges into two judgments and sentenced defendant to 300 to 369 months imprisonment with a consecutive sentence of 240 to 297 months imprisonment. Defendant filed timely written notice of appeal on 22 April 2013.

II. Guilt Phase

Defendant argues that the trial court erred in four ways during the guilt phase of his trial: (1) that the trial court erred in allowing the prosecution to ask the 14-year-old Ellen leading questions, which violated his rights under the Sixth and Fourteenth Amendments; (2) that the trial court erred by allowing the prosecutor to read Ellen's written statement to the jury; (3) that the prosecutor improperly vouched for Ellen's credibility by reading her statement to the jury; and (4) that Ellen was not competent to testify. We conclude that all of defendant's arguments are meritless and that several of them have not been properly preserved.

A. Leading Questions

[1] Defendant did object to one of the prosecutor's leading questions of Ellen on the basis of leading. We review the trial court's decision to overrule this objection for an abuse of discretion. *See State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) ("Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion.").

The prosecutor and Ellen had the following exchange leading to defendant's objection:

[Prosecutor]: I'm going to show you what's marked as State's Exhibit 6. I'm going to ask you, when I was questioning you earlier and I asked you to write down what your father did to you, is this your writing?

[Ellen]: Yes.

[Prosecutor]: Okay. And you wrote that?

[Ellen]: Yes.

[Prosecutor]: And you wrote that while you were sitting on the witness stand?

[Ellen]: Yes.

[Prosecutor]: And this happened to you, is that true?

[Ellen]: Yes.

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[Prosecutor]: And your father did this to you, is that true?

[Defense Counsel]: Objection to the leading.

THE COURT: The objection is overruled.

[Prosecutor]: Is that true?

[Ellen]: Yes.

This question was the only one to which defendant objected. Any other objection to the prosecutor's questions has not been preserved. N.C.R. App. P. 10(a)(1). The control of witness examination is discretionary, *Riddick*, 315 N.C. at 756, 340 S.E.2d at 59, and not reviewable for plain error, *see State v. Norton*, 213 N.C. App. 75, 81, 712 S.E.2d 387, 391 (2011) (noting that "discretionary decisions of the trial court are not subject to plain error review.").

The general rule is that leading questions should be asked only on cross-examination. However, a trial judge must exercise reasonable control over the mode of interrogating witnesses. Leading questions should be permitted on direct examination when necessary to develop the witness's testimony.

Riddick, 315 N.C. at 755, 340 S.E.2d at 59 (citations, quotation marks, and ellipses omitted).

Here, Ellen testified in response to a non-leading question that something bad happened between her and defendant. She testified that she was watching TV in her sister's basement bedroom when defendant came in and sat down on the bed next to her. She stated that he told her to undress and took his clothes off. The prosecutor asked what happened next, but Ellen did not respond. She had already been crying at several points throughout her testimony and it is clear from the transcript that she refused to look at anyone in the eye or answer questions about what happened after her father got into the bed with her naked.

In response, the prosecutor began asking her more leading questions, encouraging her to tell the truth and to say what happened. She responded to various questions about the people with whom she had discussed what had happened, but would not say what defendant did to her. Out of the presence of the jury, the prosecutor attempted to refresh Ellen's recollection by having her read a prior written statement she had made, but Ellen refused to look at it. The trial court instructed Ellen to answer both the prosecutor's and the defense attorney's questions. The court also warned the prosecutor that if Ellen refused to answer

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questions on cross-examination, he would have to strike her testimony. When the jury returned, she continued not to respond to questions about what defendant did to her. While Ellen was still on the witness stand, the prosecutor had Ellen write down what defendant did to her. They then had the exchange discussed above.

The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth.

State v. Greene, 285 N.C. 482, 492-93, 206 S.E.2d 229, 236 (1974).

Here, the prosecutor was attempting to ask a 14-year-old witness explicit questions about her father's sexual conduct toward her. She was clearly very reluctant to testify about it in detail and out loud. The prosecutor repeatedly urged Ellen to tell the truth, regardless of what her answer would be. The prosecutor attempted to refresh her recollection with her prior statements, but she still refused to specify what defendant did to her. Leading questions were clearly necessary here to develop the witness's testimony. Given the facts of this case, we cannot say that the trial court abused its discretion in permitting the prosecutor to ask Ellen leading questions. See *Riddick*, 315 N.C. at 756, 340 S.E.2d at 59.

Defendant also makes a brief argument that the prosecutor violated his right to confront his accuser under the Sixth and Fourteenth Amendments by asking Ellen leading questions. He cites no case holding that a trial court's decision to allow leading questions on direct examination implicates a criminal defendant's confrontation rights. Ellen testified in open court and defendant had a full and fair opportunity to cross-examine her, which he did. This argument is meritless.

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B. Reading to the Jury

[2] Defendant next argues that it was error for the trial court to permit the prosecutor to read Ellen’s in-court, written statement to the jury. The challenged statement was a one-line written statement about that which Ellen could not bring herself to say aloud: that defendant placed his penis in her vagina. It was made in court, before the jury, and defendant had an opportunity to cross-examine her about the statement, an opportunity he took advantage of. Other than a single reference—without a cite—to that which “Confrontation requires,” he makes no argument that any rule of evidence, statute, or constitutional provision was violated by this manner of presentation. Therefore, we have no legal basis upon which to review this alleged error. *See* N.C.R. App. P. 28(b) (6). It is not the role of this Court to craft defendant’s arguments for him. *Viar v. North Carolina Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that “[i]t is not the role of the appellate courts, . . . to create an appeal for an appellant”).

C. Vouching for Credibility of the Witness

[3] Defendant further argues that the prosecutor vouched for Ellen’s credibility by reading her in-court, written statement to the jury. The prosecutor never made any statement directly about Ellen’s credibility. Defendant simply contends that the act of reading the statement itself was equivalent to vouching for her credibility. He did not object on this basis below and does not specifically argue on appeal that this alleged error would constitute plain error. Therefore, it has not been preserved for our review. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (“To have an alleged error reviewed under the plain error standard, the defendant must ‘specifically and distinctly’ contend that the alleged error constitutes plain error.”).

D. Ellen’s Competency

[4] Defendant does argue that the admission of Ellen’s testimony constituted plain error because she was incompetent to testify. As defendant notes, “the competency of a witness is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness.” *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987) (citation, quotation marks, and emphasis omitted). Defendant never raised the issue of Ellen’s competency below and “discretionary decisions of the trial court are not subject to plain error review.” *Norton*, 213 N.C. App. at 81, 712 S.E.2d at 391. Therefore, this alleged error has not been preserved for our review.

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III. Ineffective Assistance of Counsel

[5] Defendant next argues that his trial counsel rendered ineffective assistance of counsel by not objecting to the introduction of a videotaped interview of Ellen.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Ballance, ___ N.C. App. ___, ___, 720 S.E.2d 856, 867 (2012) (citation and quotation marks omitted). Defendant cannot show that his trial counsel's performance fell below an objective standard of reasonableness or that the failure to object prejudiced him if the evidence to which he failed to object was admissible.

Here, the out-of-court videotaped statement was introduced to corroborate Ellen's testimony as a prior consistent statement and the trial court gave a limiting instruction to that effect. "A prior consistent statement may be admissible as non-hearsay even when it contains new or additional information when such information tends to strengthen or add credibility to the testimony which it corroborates. Out-of-court statements offered to corroborate a child's testimony regarding sexual abuse have been held to be non-hearsay." *State v. Treadway*, 208 N.C. App. 286, 290, 702 S.E.2d 335, 341 (2010) (citations and quotation marks omitted), *disc. rev. denied*, 365 N.C. 195, 710 S.E.2d 35 (2011). There is no colorable argument that this evidence was inadmissible and defendant makes none. Therefore, we hold that defendant has failed to show that he received ineffective assistance of counsel.

IV. Sentencing Phase

[6] Defendant next argues that the trial court violated his right to due process by quoting the Bible during sentencing.

A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights.

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State v. Boone, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). “When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right.” *State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379-80 (1980).

The trial court heard arguments from both attorneys, but neither aggravating nor mitigating evidence was offered. The State asked for all sentences to run consecutively, while defendant asked for a single sentence. Defendant’s only argument at the sentencing hearing was that it was a close case and that “he has been a caring father and husband and supportive.” Before pronouncing its sentence, the trial court addressed defendant:

Well, let me say this: I think children are a gift of God and I think God expects when he gives us these gifts that we will treat them as more precious than gold, that we will keep them safe from harm the best as we’re able and nurture them and the child holds a special place in this world. In the 19th chapter of Matthew Jesus tells his disciples, suffer the little children, to come unto me, forbid them not: for such is the kingdom of heaven. And the law in North Carolina, and as it is in most states, treats sexual abuse of children as one of the most serious crimes a person can commit, and rightfully so, because the damage that’s inflicted in these cases is incalculable. It’s murder of the human spirit in a lot of ways. I’m going to enter a judgment in just a moment. But some day you’re going to stand before another judge far greater than me and you’re going to have to answer to him why you violated his law and I hope you’re ready when that day comes.

Defendant correctly observes that taking into account the religious beliefs of either the trial judge or the defendant is an improper sentencing consideration. “Courts . . . cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it.” *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991). However, a trial court’s religious references during sentencing only violate due process “where impermissible personal views expressed at sentencing were the basis of the sentence.” *United States v. Traxler*, 477 F.3d 1243, 1249 (10th Cir. 2007), *cert. denied*, 552 U.S. 909, 169 L.Ed. 2d 186 (2007).

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As the Fourth Circuit observed in *Bakker*, “[t]o a considerable extent a sentencing judge is the embodiment of public condemnation and social outrage. As the community’s spokesperson, a judge can lecture a defendant as a lesson to that defendant and as a deterrent to others.” *Bakker*, 925 F.2d at 740 (citation, quotation marks, and footnote omitted). In that case, the Fourth Circuit remanded for a new sentencing hearing because it was concerned “that the imposition of a lengthy prison term here may have reflected the fact that the court’s own sense of religious propriety had somehow been betrayed.” *Id.* at 741.

In *Arnett v. Jackson*, 393 F.3d 681 (6th Cir. 2005), *cert. denied*, 546 U.S. 886, 163 L.Ed. 2d 193 (2005), the Sixth Circuit addressed a similar set of circumstances to those here. In *Arnett*, an Ohio state trial court sentenced the defendant to a fifty-one year prison term for pandering obscenity and ten counts of rape of a child. 393 F.3d at 684. The victim in that case was the daughter of defendant’s live-in girlfriend. *Id.* at 683. At the sentencing hearing, the trial court castigated defendant for his crimes, emphasizing the long-term trauma he inflicted on the victim. *Id.* at 683-84. The sentencing court also stated,

that passage where I had the opportunity to look is Matthew 18:5, 6. “And whoso shall receive one such little child in my name, receiveth me. But, whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and he were drowned in the depth of the sea.”

Id. at 684. After quoting this passage from Matthew, the court pronounced its sentence. *Id.* Defendant appealed his sentence to the Ohio appellate courts. *Id.* The Ohio Court of Appeals vacated his sentence because of the trial court’s comments. *Id.* The State appealed and the Ohio Supreme Court reversed the Court of Appeals, upholding his sentence. *Id.* After exhausting his direct appeals, the defendant filed a petition for writ of habeas corpus with the federal district court. *Id.* The federal district court found that the state courts had violated defendant’s due process rights and ordered that he be released or resentenced. *Id.* at 685.

On appeal, the Sixth Circuit reversed the district court. *Id.* at 688. The appellate court concluded that

There is nothing in the totality of the circumstances of Arnett’s sentencing to indicate that the trial judge used the Bible as her “final source of authority,” as found by

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the district court. Moreover, the Biblical principle of not harming children is fully consistent with Ohio's sentencing consideration to the same effect. If the trial judge had actually sentenced Arnett based upon a belief that God commanded that he be "drowned in the depth of the sea," we would expect the sentence imposed to be the maximum length possible. In reality, he was sentenced in the lower half of the sentencing range allowable under Ohio law.

Id. It accordingly held that the defendant's "due process rights were not violated by the judge's Biblical reference at sentencing." *Id.*

While the trial court here should not have referenced the Bible or divine judgment in sentencing, defendant cannot show that his rights were prejudiced in any way or that his sentence was based on the trial court's religious invocation. The trial court consolidated the convictions into two judgments: it consolidated the one conviction for rape of a child into the first judgment along with one count of indecent liberties and one count of incest; the remainder of the convictions were consolidated in the second judgment. The trial court sentenced defendant to 300 to 369 months imprisonment with a consecutive sentence of 240 to 297 months imprisonment. The most serious offense in the first judgment was rape of a child, which carries a 300 month mandatory minimum sentence, N.C. Gen. Stat. § 14-27.2A(b) (2009). The most serious offenses in the second judgment were Class B1 offenses. Defendant had a prior record level of 1. The presumptive range for a prior record level 1 offender convicted of a Class B1 felony was 192-240 months. Thus, the trial court sentenced defendant at the mandatory minimum for the first judgment and within the presumptive range for the second. *See* N.C. Gen. Stat. § 15A-1340.17 (2009).

The crimes of rape of a child and incest severely harm young children, often for the remainder of their lives. "[O]ur society has a long history of sternly punishing those people who hurt young children." *Arnett*, 393 F.3d at 687. The severe punishments imposed by our General Statutes for such crimes recognize this harm. The trial court's remarks similarly touched on this theme and were clearly aimed at lecturing defendant about the impact of his crimes on his daughters and on the community. In doing so, he acted as the "embodiment of public condemnation and social outrage." *Bakker*, 925 F.2d at 740.

"[W]e cannot, under the facts of this case, say that defendant was prejudiced or that defendant was more severely punished because"

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of the trial court's religious invocation at sentencing. *State v. Bright*, 301 N.C. 243, 262, 271 S.E.2d 368, 380 (1980).² "In our opinion, the evidence in this case justified the sentence imposed." *Bright*, 301 N.C. at 262, 271 S.E.2d at 380. Nevertheless, we remind trial courts that "judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not." *State v. Tice*, 191 N.C. App. 506, 516, 664 S.E.2d 368, 375 (2008).

V. Conclusion

For the foregoing reasons, we conclude that defendant has shown no prejudicial error at trial or sentencing and has failed to show that he received ineffective assistance of counsel.

NO ERROR.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
ANTONIO NEAL GRAY

No. COA13-1081

Filed 3 June 2014

1. Pretrial Proceedings—motion to continue—denied—evidence given to defense counsel at last minute

The trial court did not err in a conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion to continue where the prosecutor presented defense counsel with a copy of statement made by an alleged co-conspirator, implicating defendant, at the very last minute. The statement did not significantly change the case to defendant's prejudice so as to require additional time to prepare for trial.

2. See also *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005) (holding that an error in sentencing was not prejudicial when defendant was sentenced in the presumptive range); *United States v. Salama*, 974 F.2d 520, 522 4th Cir. (1992) (holding that the trial court's improper statements regarding the defendant's nationality did not constitute a due process violation where "any impropriety of the district court's remarks did not infect the sentence."), *cert. denied*, 507 U.S. 943, 122 L.Ed. 2d 727 (1993).

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2. Evidence—opinion testimony of detective—interpretation of text messages—no plain error

The trial court did not plainly err in a conspiracy to commit robbery with a dangerous weapon case by allowing testimony of a detective concerning his opinions, decisions, observations, and interpretation of text messages. Regardless of whether the admission of the testimony was error, given the overwhelming and uncontroverted evidence of defendant's guilt, the alleged error did not amount to plain error requiring a new trial.

3. Evidence—authentication—photographs of text messages—testimony—sufficient

The trial court did not err in a conspiracy to commit robbery with a dangerous weapon case by allowing the State to introduce into evidence photographs of text messages taken from an alleged co-conspirator's cell phone. Testimony from the detective who recovered the text messages from the phone and testimony from the person the co-conspirator was communicating with in the text messages was sufficient to authenticate the exhibit.

Appeal by defendant from judgments entered 5 April 2013 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.

McCotter Ashton, P.A., by Rudolph A. Ashton, III, for defendant-appellant.

McCULLOUGH, Judge.

Antonio Neal Gray (“defendant”) appeals from judgments entered upon his convictions for attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first degree burglary. For the following reasons, we find no error.

I. Background

On 16 July 2012, defendant was arrested pursuant to warrants finding probable cause to believe defendant committed the following offenses on 11 July 2012: two counts of attempted robbery with a dangerous weapon, one count of conspiracy to commit robbery with a dangerous weapon, and one count of first degree burglary. On

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11 September 2012 a Wake County Grand Jury indicted defendant on the charges in case numbers 12 CRS 215921 and 215922. Defendant pled not guilty and his cases came on for trial in Wake County Superior Court before the Honorable G. Wayne Abernathy on 3 April 2013.

At trial the State's evidence tended to show the following: Isai Ntirenganya was a car dealer and a club promoter in Raleigh. Through his role as a promoter, Mr. Ntirenganya met Alneisa McKoy, who expressed interest in doing some promotion work. On the evening of 11 July 2012, Mr. Ntirenganya met up with Ms. McKoy and her friend, Allison Smith, at a sweepstakes parlor and took them to his friend's home in a trailer park off New Bern Avenue to talk about promotion work. Mr. Ntirenganya's friend, Kory Clark, was the only one home at the time.

Mr. Ntirenganya and Mr. Clark both testified that they and the two women were just hanging out, talking about promotion opportunities, drinking, and smoking marijuana. Mr. Ntirenganya and Mr. Clark recalled that during this time, Ms. McKoy and Ms. Smith were on their phones texting, were giggling and whispering to each other, and were back and forth to the bathroom numerous times. Mr. Clark found their behavior suspicious.

At some point, Mr. Clark left the trailer to buy beer and cigarettes from a nearby convenience store. The women wanted to go with Mr. Clark and leave Mr. Ntirenganya by himself, but Mr. Clark left without them. When Mr. Clark returned several minutes later, he locked the door behind him.

Shortly thereafter, Mr. Ntirenganya and Ms. McKoy went to a back room in the trailer to talk. At that time, two men burst through the door that Mr. Clark had locked upon his return from the convenience store. Mr. Ntirenganya testified that someone jumped on his back and they tumbled to the floor. Mr. Ntirenganya recalled someone instructing him to "[g]et on the ground[]" and a female screaming "[s]omebody got a gun." The man that jumped on Mr. Ntirenganya's back was smaller than Mr. Ntirenganya and Mr. Ntirenganya was able to wrestle away from him and flee the trailer.

Mr. Clark testified that he heard the commotion and fled the trailer through another door. Mr. Clark did not see the intruders.

Both Mr. Ntirenganya and Mr. Clark indicated that nothing appeared to be missing from the trailer following the attempted robbery. Mr. Ntirenganya's wallet and keys, which were on top of cabinets near the door, appeared undisturbed.

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In addition to Mr. Ntirenganya and Mr. Clark, Ms. Smith and Ms. McKoy testified at trial. Their testimony revealed that they planned to rob Mr. Ntirenganya with James Diaz and defendant, who they identified as the intruders. At the time, Ms. Smith was in a relationship with Mr. Diaz and Ms. McKoy was in a relationship with defendant. Although defendant did not initially want to take part in the robbery, he went along with the plan. Ms. Smith and Ms. McKoy each described the plan in detail and testified that they were communicating with Mr. Diaz and defendant through text messages to give directions to the trailer, to inform them how many people were in the trailer, and to let them know that the door to the trailer was unlocked. These text message conversations were admitted into evidence at trial.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court allowed defendant's motion as to count two in case number 12 CRS 215921, attempted robbery with a dangerous weapon from the person of Mr. Clark, and denied the motion as to the remaining charges. Defendant did not put on any evidence and the case was given to the jury.

On 5 April 2013, the jury returned verdicts finding defendant guilty of attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first degree burglary. The trial court then entered judgments sentencing defendant to a term of 23 to 40 months for conspiracy to commit robbery with a dangerous weapon and a consecutive term of 59 to 83 months imprisonment for attempted robbery with a dangerous weapon and first degree burglary, which were consolidated for judgment. Defendant gave notice of appeal in open court.

II. Discussion

Defendant raises the following three issues on appeal: whether the trial court (1) erred in denying his motion to continue; (2) plainly erred in allowing testimony of a detective concerning his opinions, decisions, observations, and interpretation of text messages; and (3) erred in allowing the State to introduce text messages from Mr. Diaz's cell phone. We address each issue in order.

Motion to Continue

[1] The trial court granted defense counsel a twenty-four hour continuance on 2 April 2013. Then, as the State prepared to call defendant's case for trial on 3 April 2013, defense counsel renewed his motion to continue asserting he needed additional time to prepare for trial following the

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late receipt of a statement by Ms. McKoy implicating Mr. Diaz as the possessor of the gun during the attempted robbery. Specifically, defense counsel argued he prepared for trial as if defendant possessed the gun during the attempted robbery and he needed extra time to prepare the defense following receipt of Ms. McKoy's statement, which defense counsel claimed changed the theory of the State's case against defendant to acting in concert.

The trial court rejected defendant's argument and denied the motion to continue. The trial court reasoned that Ms. McKoy's statement was duplicative, did not introduce any new actors or witnesses, and did not significantly change the State's case against defendant. The trial court explained that, under the law, it did not matter who possessed the gun; if one of the perpetrators possessed a gun, all perpetrators were guilty to the same extent. Additionally, the trial court noted it had already granted defendant a twenty-four hour continuance.

Now on appeal, defendant contends the trial court erred in denying his motion to continue. We disagree.

As this Court has recognized,

“Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review.” *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001) (citing *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). “‘Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.’” *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (quoting *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)). “However, if ‘a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.’” *State v. Jones*, 342 N.C. 523, 530–31, 467 S.E.2d 12, 17 (1996) (quoting *State v. Covington*, 317 N.C. 127, 129, 343 S.E.2d 524, 526 (1986)).

In re D.Q.W., 167 N.C. App. 38, 40-41, 604 S.E.2d 675, 676-77 (2004).

“To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show ‘how his case would have been

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better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.’ [A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance.’ [A] postponement is proper if there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts.””

Id. at 41, 604 S.E.2d at 677 (quoting *State v. McCullers*, 341 N.C. 19, 31–32, 460 S.E.2d 163, 170 (1995) (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986); *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986); and *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (other citation omitted))).

In support of his argument that the trial court erred, defendant cites two cases, *State v. Smith*, 178 N.C. App. 134, 631 S.E.2d 34 (2006) and *State v. Pickard*, 107 N.C. App. 94, 418 S.E.2d 690 (1992), in which trial courts denied the respective defendants’ motions for continuances. This Court subsequently affirmed the trial courts’ decisions in both of those cases. *Smith*, 178 N.C. App. at 142–44, 631 S.E.2d at 39–41; *Pickard*, 107 N.C. App. at 100–01, 418 S.E.2d at 693–94. Defendant then argues a different result is warranted in this case because it is distinguishable from *Smith* and *Pickard*. Specifically, defendant repeats the argument made before the trial court that, while Ms. McKoy’s statement is less inculpatory of defendant, the statement was prejudicial to defendant because it changed the theory of the case against him at the eleventh hour.

Although the present case may be distinguished from *Smith* and *Pickard*, we are not convinced that the trial court erred in denying defendant’s motion to continue. We agree with the trial court that Ms. McKoy’s statement did not significantly change the case to defendant’s prejudice so as to require additional time to prepare for trial beyond the twenty-four hour continuance already granted by the trial court. Thus, we hold the trial court did not abuse its discretion in denying defendant’s motion to continue.

To the extent defendant argues the denial violated his constitutional rights, defendant was not prejudiced. As argued by the State, there is nothing in the record tending to show that the State implied it was proceeding to trial solely on the theory that defendant possessed the gun. In fact, defense counsel should not have been surprised by Ms. McKoy’s statement. During defendant’s bond hearing on 11 February 2013, months before trial, the State summarized the evidence against defendant. In that summary, the State indicated that Mr. Diaz possessed

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the gun during the attempted robbery. Defense counsel was present at the hearing.

Moreover, there was contradictory testimony elicited by the State at trial from which the jury could have determined defendant possessed the gun during the attempted robbery. Ms. Smith testified that defendant possessed the gun while Ms. McKoy testified that Mr. Diaz entered the trailer with the gun.

Opinion Testimony

[2] At trial, the State called Detective Snowden of the Raleigh Police Department to testify. The State then questioned Detective Snowden about text messages between the perpetrators on the night of the attempted robbery. Detective Snowden testified about three separate text message conversations: a conversation between Ms. McKoy and defendant, a conversation between Mr. Diaz and Ms. Smith, and a conversation between Mr. Diaz and Ms. McKoy.

When questioned about the text messages between Ms. McKoy and defendant, Detective Snowden stated “it was clear . . . that [Ms. McKoy] had assisted [defendant] with the plan and execution of the attempted robbery. And it looked like directions were given to [defendant’s] cell phone and allowing access to the residence.” Detective Snowden also testified that the address provided to defendant by Ms. McKoy in the text messages corresponded to the trailer where the attempted robbery took place and it appeared defendant was asking Ms. McKoy if the door to the trailer was open. When questioned about his observations of the text messages between Mr. Diaz and Ms. Smith, Detective Snowden responded that they appeared to illustrate “the actual time line [sic] of the attempted robbery, along with, [he] guess[ed], the escape of Ms. Smith.” Detective Snowden stated “[i]t was clear that [Ms. Smith] had helped her boyfriend, Mr. Diaz, plan and execute the attempted robbery.” Detective Snowden further indicated that defendant’s and Ms. McKoy’s nicknames appeared in the text message conversation. When questioned about his observations of the third text message conversation between Ms. McKoy and Mr. Diaz, Detective Snowden stated, “it appeared that directions were being given, the doors were being asked to be unlocked, and then it seemed like they were trying to find Ms. Smith.”

Detective Snowden then described his overall impression from the text messages as follows:

Just looking at the text messages, again, like I said, it kind of gave a good timeline of what had occurred, that a

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robbery was being planned with Mr. Diaz and [defendant] involved, and that the girls were part of that robbery, and they were supposed to open a door. They were telling them how much money was there, how many people – or how many victims might be there.

Just – all together, it just – it kind of put everything in place as far as a robbery was going to be done, but, as described by the victims, it was botched, and nothing was gotten. And it seemed like, once Ms. Smith got lost, it also showed you they were trying to find her, you know, and direct her how to get to a certain spot to be picked up.

Defendant did not object to Detective Snowden’s testimony at trial. Yet, now on appeal, defendant contends the trial court plainly erred in allowing Detective Snowden to testify regarding his opinions and observations of the text messages. We disagree.

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4) (2014).

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

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

Regardless of whether or not the admission of Detective Snowden’s testimony concerning his opinion and observations from the text messages was error, given the overwhelming and uncontroverted evidence of defendant’s guilt in the record, the alleged error does not amount to plain error requiring a new trial.

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Text Messages

[3] As referenced, at trial, the State introduced photographs of text messages between Mr. Diaz and Ms. Smith and between Mr. Diaz and Ms. McKoy that were found on Mr. Diaz's cell phone following his arrest. Defendant did not initially object to the admission of the photographs of the text messages and they were admitted into evidence as the State's exhibits ten and twelve. At the request of the State, Detective Snowden read the text messages photographed in exhibit ten aloud in open court. Defendant did not object. However, immediately after exhibit twelve was admitted and the State requested that Detective Snowden read the photographed text messages between Mr. Diaz and Ms. McKoy in open court, defense counsel asked to be heard and objected to the admission of exhibit twelve based on lack of authentication. After hearing arguments, the trial court overruled defendant's objection.

Defendant now contends the trial court erred in allowing the photographs of the text messages between Mr. Diaz and the two women to be admitted into evidence.

At the outset, we note defendant's objection was untimely as to the admission of exhibit ten. Therefore, defendant has not preserved the issue for appeal. *See* N.C. R. App. P. 10(a)(1) (2014) ("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."). Nevertheless, the following analysis for exhibit twelve applies equally to exhibit ten.

In support of his argument that there was inadequate authentication, defendant cites *State v. Taylor*, 178 N.C. App. 395, 632 S.E.2d 218 (2006). In *Taylor*, the State sought to admit printouts or transcripts of text messages sent to and from the victim's cell phone. *Id.* at 412, 632 S.E.2d at 230. In order to authenticate the text messages, the State called employees of the cell phone company to testify concerning how the company kept records of its customers' text messages and how they are retrieved. *Id.* at 413, 632 S.E.2d at 230. This court held the combination of the employee's testimony and the circumstantial evidence within the text messages was sufficient to authenticate the evidence. *Id.*

Defendant now argues the same type of testimony was needed in this case to authenticate the photographs of the text messages admitted as exhibit twelve. We disagree.

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The North Carolina Rules of Evidence provide that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C. Gen. Stat. § 8C-1, Rule 901(a) (2013). The rule further provides a nonexclusive list of ways to authenticate evidence, including “testimony of a witness with knowledge ‘that a matter is what it is claimed to be.’” *Taylor*, 178 N.C. App. at 413, 632 S.E.2d at 230 (quoting N.C. Gen. Stat. § 8C-1, Rule 901(b)(1)).

In this case, Detective Snowden testified that he took pictures of text messages on Mr. Diaz’s cell phone while searching the phone incident to Mr. Diaz’s arrest. Detective Snowden then identified the photographs in exhibit twelve as screen shots of Mr. Diaz’s cell phone and testified that they were in substantially the same condition as when he obtained them. Ms. McKoy, with whom Mr. Diaz was communicating in the text messages, also testified to the authenticity of exhibit twelve. Specifically, Ms. McKoy testified that she, Mr. Diaz, Ms. Smith, and defendant had planned to rob Mr. Ntirenganya. The plan was that she and Ms. Smith would meet up with Mr. Ntirenganya and communicate with Mr. Diaz and defendant through text messages to let them know what was going on. Ms. McKoy testified that she sent text messages to Mr. Diaz and defendant telling them where the trailer was located, how many people were in the trailer, and that the door was open. Ms. McKoy then identified exhibit twelve as the text message conversation between her and Mr. Diaz. Ms. McKoy further stated exhibit twelve was an accurate representation of her text message conversation with Mr. Diaz.

We hold the testimony in this case by Detective Snowden, who recovered the text messages from Mr. Diaz’s cell phone, and Ms. McKoy, with whom Mr. Diaz was communicating in the text messages illustrated in exhibit twelve, was sufficient to authenticate exhibit twelve. Thus, the trial court did not err in admitting the photographs into evidence.

III. Conclusion

For the reasons discussed above, the trial court did not error in denying defendant’s motion to continue or in allowing the photographs of the text messages into evidence at trial. Additionally, the trial court did not plainly error in allowing the testimony of Detective Snowden.

No Error.

Judges HUNTER, Robert C., and GEER concur.

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[234 N.C. App. 207 (2014)]

STATE OF NORTH CAROLINA

v.

ALBERT GREY GURKIN, SR.

No. COA13-1220

Filed 3 June 2014

1. Jury—alleged misconduct—judicial inquiry into conduct—no abuse of discretion

The trial court did not abuse its discretion in a homicide case by declining to inquire into alleged improper discussions by prospective jurors. The trial court acted within its discretion in declining to conduct any further inquiry into the alleged improper discussions of prospective jurors and limiting the scope of its inquiry.

2. Jury—selection procedures—deviation from statutory procedure—no prejudice shown

The trial court did not plainly err in a homicide case by deviating from the statutory procedure governed by N.C.G.S. § 15A-1214 for passing jurors to defendant during jury selection. Although it was undisputed that the trial court violated the statutorily mandated procedure, defendant failed to show prejudice such as jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, nor any other defect which had the likelihood to affect the outcome of the trial. Furthermore, the deviation from the statutory procedure in this case did not constitute reversible error *per se*.

3. Homicide—jury instructions—omission of involuntary manslaughter instruction—not prejudicial

The trial court did not commit plain error in a murder case by omitting an instruction on involuntary manslaughter. In finding defendant guilty of second-degree murder, the jury necessarily found beyond a reasonable doubt that defendant acted with malice, rejecting the absence of malice necessary for involuntary manslaughter. Thus, it could not be said that had the jury been instructed on involuntary manslaughter, the jury would have reached a different verdict.

4. Homicide—jury instructions—self-defense—imperfect self-defense—no evidence to support either instruction

The trial court properly denied defendant's requested instructions on self-defense and imperfect self-defense in a murder case.

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The evidence taken in the light most favorable to defendant failed to show any circumstances that would suggest that defendant reasonably believed it was necessary or reasonably necessary for him to kill his wife in order to avoid death or great bodily harm.

Appeal by defendant from judgment entered 7 February 2013 by Judge Wayland J. Sermons, Jr., in Martin County Superior Court. Heard in the Court of Appeals 19 March 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

McCULLOUGH, Judge.

Defendant appeals from judgment entered 7 February 2013 after a Martin County jury found him guilty of second-degree murder. For the following reasons, we find no prejudicial error.

I. Background

Defendant, Albert Grey Gurkin, Sr., was indicted for first-degree murder on 17 August 2009. Defendant was tried at the 28 January 2013 Criminal Session of Martin County Superior Court, the Honorable Wayland J. Sermons, Jr., presiding.

Prior to the start of jury selection, the trial court inquired as to whether counsel had any objections and no objections were raised. Jury selection began with the trial court selecting six prospective jurors for *voir dire*. All six prospective jurors were passed to the defense. The trial court excused one venire member and the defense accepted the remaining five. The trial court then directed the clerk to call seven prospective jurors. This modified process continued without objection until a full jury was accepted.

During the *voir dire* of prospective juror Ms. McNeil, McNeil stated she overheard some discussion in the jury room about the case. Specifically, she overheard a few prospective jurors discussing whether they knew defendant or what the case was about. During the State's *voir dire* questioning, the following exchange took place:

MR. EDWARDS: Have you -- since this happened, do you recall having a conversation with anyone about the case?

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JUROR NO. 7/MS. MCNEILL: Not really. Just, you know wondering what it was about when I was sitting in the jury room.

During defense counsel's *voir dire* questioning, the following exchange took place:

MR. DUPREE: You mentioned something that I'm going to ask you a couple of questions about. You said in the jury room where you've all got so much free time over the last few days there was some discussion about what was going on or what the case was about?

JUROR NO. 7/MS. MCNEILL: Yes, a little bit.

MR. DUPREE: What kind of discussion did you hear?

JUROR NO. 7/MS. MCNEILL: Did we — did anybody know him, you know, Grey, know him personally and what happened, that sort of thing. I know you said not to do that, but they did.

THE COURT: I sure did.

MR. DUPREE: Would you say that was quite a few people asking each other about —

JUROR NO. 7/MS. MCNEILL: No, not a lot. Just a few.

MR. DUPREE: Just people in your circle?

JUROR NO. 7/MS. MCNEILL: Just a little bit around me.

MR. DUPREE: Well, obviously, you knew, and you're an accomplished person who has had a long career, what the Judge's specific instructions were. Do you feel like that that disobedience, that discussion, had any impact on you?

JUROR NO. 7/MS. MCNEILL: No, because nobody knew much about it.

MR. DUPREE: . . . In its entire capacity, do you think any of those discussions would have caused any impact on the ability to sit on this jury?

JUROR NO. 7/MS. MCNEILL: No.

MR. DUPREE: Now, other than asking about what was — if anybody knew him or knew them or whatever, what else was discussed that you heard?

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JUROR NO. 7/MS. MCNEILL: That's about it. It was the same thing. It was what I read in the paper or on the news.

MR. DUPREE: They talked about that, the coverage that had been applied to the media?

JUROR NO. 7/MS. MCNEILL: A little bit. But — (shaking her head back and forth.)

Based on these exchanges, defense counsel made a motion for mistrial. After the court asked defense counsel whether he intended to offer any evidence in support of his motion, he requested to examine the 57 remaining members of the jury pool that may have been in the room at the time of the alleged improper discussion. That request, along with the motion for mistrial, was denied. The trial court declined to excuse Ms. McNeill for cause and the defense used one of its peremptory challenges to excuse her.

The evidence at trial tended to show the following: defendant and Jewel Gurkin, the victim, had a contentious marriage. They would often go days without speaking to one another. A main point of contention was the contents of defendant's will. Defendant wanted to leave all of his money to Jewel and all of his land to his son, Grey Gurkin, Jr. Jewel was unhappy about defendant leaving the land to his son. Jewel told others about her troubles with defendant and that she feared "something was going to happen."

The night before Jewel's death, she and defendant engaged in a heated argument about defendant's will. The next morning, defendant went into the bathroom to shave and brush his teeth. While defendant was washing his eyes with a hot washcloth, Jewel touched defendant in his lower back with a stun gun. Defendant turned around and pushed Jewel up against the cabinets in an attempt to keep her from using the stun gun again. Defendant was able to use his left hand to push the stun gun into Jewel's side. Defendant had no memory of what he did with his right hand. Jewel "snatched back" and the stun gun burned defendant's fingers. According to defendant, the next thing he knew, they were on the floor.

Defendant noticed blood in the corner of Jewel's mouth and discovered she was not breathing. When defendant realized Jewel was dead, he wrapped her in a blanket, tied her hands and feet together, and carried her down to a pond on his property. He moved some sticks and limbs around and laid her on the ground. Police were alerted when Jewel failed to show up for work. They were unable to find her. That night, defendant

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stayed with his son and told him what he had done. Sometime between midnight and 5:00 a.m., defendant moved and unwrapped the body so it could be found. After moving the body, defendant was immediately apprehended by the police, who had been searching for the body all day.

An autopsy revealed the cause of death to be strangulation. The state's expert testified that it can take approximately ten seconds of compression on the neck for a person to lose consciousness and approximately five minutes to cause death.

At the close of the evidence, the trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, and acquittal. Defense counsel requested instructions on self-defense and imperfect self-defense, which the trial court denied. The jury returned a verdict finding defendant guilty of second-degree murder and the trial court entered a judgment sentencing defendant to a term of 189 to 236 months in prison. Defendant gave notice of appeal in open court.

II. Discussion

Defendant raises the following issues on appeal: (1) whether the trial court abused its discretion by declining to inquire into alleged improper discussions by prospective jurors; (2) whether the trial court plainly erred in deviating from the statutory procedure for passing jurors to defendant during jury selection; (3) whether the trial court plainly erred in omitting an instruction on involuntary manslaughter; and (4) whether the trial court properly denied defendant's requested instructions on self-defense and imperfect self-defense.

A. Jury Misconduct

[1] Defendant first asserts that the trial court abused its discretion by declining to make an inquiry into alleged improper discussions by prospective jurors. Specifically, defendant argues that when such jury misconduct is alleged, the trial court must conduct an investigation into the alleged misconduct and does not have the discretion to decline to do so.

In reviewing a trial court's decision to grant or deny a motion for mistrial on the basis of juror misconduct, we review for abuse of discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). The trial court's decision should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible. *Id.*

"The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight

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on appeal.” *Id.* at 83, 405 S.E.2d at 158. When jury misconduct is alleged, the trial court is vested with the “discretion to determine the procedure and scope of the inquiry.” *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996).

Defendant relies on *State v. Harris*, 145 N.C. App. 570, 551 S.E.2d 499 (2001), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002), for the contention that an absolute duty to investigate juror misconduct is imposed upon the trial court when such misconduct is alleged. Specifically, defendant cites to the following sentence: “Where juror misconduct is alleged . . . the trial court must investigate the matter and make appropriate inquiry.” *Harris*, 145 N.C. App. at 576, 551 S.E.2d at 503. Defendant’s reliance on this quote ignores the immediately following sentence from *Harris*: “However, there is no absolute rule that a court must hold a hearing to investigate juror misconduct upon an allegation.” *Id.* at 576-77, 551 S.E.2d at 503. Indeed, this Court has held that only “[w]hen there is *substantial reason to fear* that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial.” *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (emphasis added). Further, “[a]n examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous.” *Harris*, 145 N.C. App. at 577, 551 S.E.2d at 503.

Our Supreme Court has held that “[i]n the event of some contact with a juror it is the duty of the trial judge to determine whether such contact resulted in *substantial and irreparable prejudice* to the defendant. It is within the discretion of the trial judge as to what inquiry to make.” *Burke*, 343 N.C. at 149, 469 S.E.2d at 911 (emphasis added) (quoting *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992)).

The trial court acted within its discretion in declining to conduct any further inquiry into the alleged improper discussions of prospective jurors and limiting the scope of its inquiry to the lines of questioning quoted above. When asked by the court, defense counsel could not say how defendant was prejudiced. Ms. McNeill stated that from what she overheard, no prospective juror indicated that he or she either knew defendant or anything about the case. Based upon Ms. McNeill’s responses and the trial court’s observations, the trial court was satisfied that the alleged statements of prospective jurors did not give rise to a substantial reason to fear that the jury was prejudiced. It was well within the trial court’s discretion when it limited its inquiry to a consideration of Ms. McNeill’s *voir dire* and determined that there was no

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prejudice to defendant. Accordingly, we hold that the trial court did not err in refusing to conduct any further inquiry.

B. Jury Selection Procedure

[2] Defendant next asserts that the trial court erred in deviating from the statutory procedure for passing jurors to defendant during jury selection. Defendant argues that deviation from the requirements of N.C. Gen. Stat. § 15A-1214 entitles him to a new trial. We disagree.

Although defendant failed to object to the procedure utilized at trial, “when a trial court acts contrary to a statutory mandate . . . the right to appeal the court’s action is preserved.” *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 192 (2006) (internal quotation marks omitted). In reviewing a trial court’s deviation from the statutory procedure for the passing of jurors to the defendant where defendant failed to object to the procedure, we review for plain error. *State v. Stroud*, 147 N.C. App. 549, 564, 557 S.E.2d 544, 553 (2001). Our Supreme Court recently clarified how the plain error rule is to be applied in North Carolina:

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 internal quotation marks omitted). Further, the plain error rule is to be applied cautiously and only in exceptional cases, and the error will often be one that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]” *Id.* (quotation marks and citations omitted).

The procedure for passing prospective jurors to a defendant during jury selection is governed by N.C. Gen. Stat. § 15A-1214, which provides in pertinent part:

(d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. . . .

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. . . .

(f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant. . . . This procedure is repeated until all parties have accepted 12 jurors.

N.C. Gen. Stat. § 15A-1214(d) and (f) (2013). It is undisputed that the trial court violated the statutorily mandated procedure for jury selection. Despite this violation, “a new trial does not automatically follow a finding of statutory error.” *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 742-43 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Our Supreme Court has “consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial.” *Id.* at 406, 597 S.E.2d at 743.

The procedure for jury selection is designed to “ensure the empanelment of an impartial and unbiased jury.” *Love*, 177 N.C. App. at 623, 630 S.E.2d at 241 (internal quotation marks omitted). Defendant, both in his brief and reply brief, asserts a claim of prejudice on the basis that the trial court deviated from the statutory procedure. However, defendant fails to show, nor does he argue, “jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, nor any other defect which had the likelihood to affect the outcome of the trial.” *Id.*

Defendant’s basis for prejudice on appeal is that he exhausted his peremptory challenges. We are not persuaded by this argument. Defendant’s bare assertion that he was prejudiced in this manner fails to meet his “heavier burden of showing that the error rises to the level of plain error.” *Lawrence*, 365 N.C. at 516, 723 S.E.2d 333.

Defendant also contends that deviation from the statutory procedure constitutes reversible error per se. To support this contention, defendant relies on *Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622 (1987). However, whatever support defendant draws from *Gray* is limited to capital cases. Accordingly, because defendant has failed to show prejudice, we hold that the trial court’s deviation from the statutory procedure does not warrant a new trial.

C. Instruction on Involuntary Manslaughter

[3] Defendant’s third contention is that the trial court erred by failing to instruct the jury on the lesser-included offense of involuntary

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manslaughter. Defendant argues that because the evidence suggests he acted with at most culpable negligence, the trial court should have instructed the jury on involuntary manslaughter. We disagree.

Because defendant did not request an instruction on involuntary manslaughter and did not object to the instructions given at trial, we review for plain error. *State v. McCollum*, 157 N.C. App. 408, 412, 579 S.E.2d 467, 469 (2003), *aff'd*, 358 N.C. 132, 591 S.E.2d 519 (2004). As noted above, the plain error rule is to be applied cautiously, and only in exceptional cases where a fundamental error occurred such that the error had a probable impact on the jury's finding that the defendant was guilty. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

The distinguishing difference between second-degree murder and manslaughter is the presence of malice in second-degree murder and its absence in manslaughter. *McCollum*, 157 N.C. App. at 412, 579 S.E.2d at 470. Defendant argues that the evidence showed he acted recklessly and with a disregard for human life and did not intend to kill Jewel. Thus, defendant argues, an instruction on involuntary manslaughter was necessary. However, malice can be implied where a defendant acted so recklessly or wantonly "as to manifest depravity of mind and disregard for human life. In such a case, the homicide cannot be involuntary manslaughter, even if the assailant did not intend to kill the victim." *Id.* at 412-13, 579 S.E.2d at 570 (internal quotation marks and citation omitted).

We find *McCollum* to be squarely on point with our case. In that case, as here, the trial court submitted first-degree murder, second-degree murder, voluntary manslaughter, and acquittal to the jury, who returned a verdict of second-degree murder. The defendant did not request an instruction on involuntary manslaughter, nor did he object to the lack of such an instruction. This Court held that when the jury returned a verdict of second-degree murder, it necessarily negated a finding of the absence of malice:

When the jury convicted defendant of second-degree murder and rejected voluntary manslaughter, it necessarily found that defendant acted with malice. A finding of malice precludes a finding of either voluntary manslaughter or involuntary manslaughter. Any asserted error in failing to instruct on involuntary manslaughter was harmless and does not rise to the level of plain error.

McCollum, 157 N.C. App. at 414, 579 S.E.2d at 471 (citation omitted). In finding defendant guilty of second-degree murder, the jury necessarily found beyond a reasonable doubt that defendant acted with malice,

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rejecting the absence of malice necessary for involuntary manslaughter. The jury had an opportunity to find an absence of malice and did not. Thus, it cannot be said that had the jury been instructed on involuntary manslaughter, the jury would have reached a different verdict. Accordingly, we hold that the trial court did not plainly err in failing to instruct the jury on involuntary manslaughter.

D. Self-Defense and Imperfect Self-Defense Instruction

[4] Defendant's final argument is that the trial court erred in denying his request to instruct the jury on self-defense and imperfect self-defense. Because defendant requested jury instructions on self-defense and imperfect self-defense, we review *de novo*. *State v. Cruz*, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50 (2010).

Perfect self-defense excuses a killing completely when it is shown at the time of the killing 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 the 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. Bush, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982). An instruction on imperfect self-defense arises when only the first two of the above elements are shown. *Id.* at 159, 297 S.E.2d at 568.

A defendant is entitled to an instruction on self-defense only where 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." *Id.* at 160, 297 S.E.2d at 569. It is for the trial court to determine as a matter of law "whether there is any evidence that the defendant

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reasonably believed it to be necessary to kill his adversary in order to protect himself from death or great bodily harm.” *Id.* In determining whether a self-defense instruction should have been given, we examine the facts in the light most favorable to the defendant. *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889 (1993).

At no point during the trial did defendant testify that he thought it was necessary or reasonably necessary to kill Jewel in order to protect himself from death or great bodily harm. Defendant only testified that his wife was holding a stun gun and that he pushed her up against the bathroom cabinets to keep her from using the stun gun. Defendant was able to push the stun gun into Jewel’s side and ultimately subdued her. He did not state that he feared for his life or that he feared he might suffer great bodily harm at any time during the altercation. Defendant’s testimony does not suggest, neither explicitly nor implicitly, that it was necessary or reasonably necessary to kill his wife in order to avoid death or great bodily harm.

We find that the evidence taken in the light most favorable to defendant fails to show any circumstances that would suggest that defendant reasonably believed it was necessary or reasonably necessary for him to kill Jewel in order to avoid death or great bodily harm. Because defendant failed to satisfy the required elements for an instruction on self-defense or imperfect self-defense, we hold that the trial court did not err in refusing to submit those issues to the jury.

III. Conclusion

For the reasons stated above, we conclude that the trial court did not commit prejudicial error.

No prejudicial error.

Judges ELMORE and DAVIS concur.

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[234 N.C. App. 218 (2014)]

STATE OF NORTH CAROLINA

v.

FRANCIS MARIUS HOGAN, JR., DEFENDANT

No. COA13-1284

Filed 3 June 2014

1. Confessions and Incriminating Statements—spontaneous statement—not custodial interrogation

The trial court did not err in an assault case by denying defendant's motion to suppress his statement to police. Defendant's statements in response to questions posed to the victim were spontaneous and not the result of custodial interrogation. Therefore, defendant was not subjected to custodial interrogation without the benefit of *Miranda* warnings.

2. Sentencing—prior record level—out-of-state conviction—felony

The trial court did not err in an assault case by calculating defendant's prior record level counting a New Jersey third-degree theft conviction as a Class I felony. New Jersey considers third-degree offenses to be the same as common law felonies and a certified criminal history record from New Jersey presented by the State that contained defendant's New Jersey Criminal History Detailed Record and listed defendant's theft convictions as felony convictions was sufficient under *State v. Lindsey*, 118 N.C. App. 549, to show that it was a felony. Furthermore, defendant failed to show that third-degree theft in New Jersey is substantially similar to a North Carolina misdemeanor.

Appeal by defendant from Judgment entered 12 March 2013 and Order entered 26 February 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 20 March 2014.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Lars F. Nance, for the State.

Michele Goldman, for defendant-appellant.

STROUD, Judge.

Francis Hogan, Jr. ("defendant") appeals from the judgment entered 12 March 2013 after he pled guilty to assault by strangulation and from

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the order entered 26 February 2013 denying in part his motion to suppress statements he made to police. We affirm the trial court's order denying defendant's motion to suppress in part and find no error in sentencing.

I. Background

Defendant was indicted for assault on a female and assault by strangulation on 3 December 2012. The indictments alleged that defendant had assaulted Karen Teixeira by pushing her against a wall and by putting his hands around her neck and choking her. Defendant moved to suppress statements he made to police when they responded to the home that he and Ms. Teixeira shared.

On 16 September 2012, Deputy Reliford and Deputy Carroll of the Johnston County Sheriff's Office responded to a call reporting a domestic disturbance at a residence in Princeton. After they entered the house, they found defendant hiding in a closet which also contained "an engine and various engine parts" and the deputies were concerned that these objects may contain a hidden weapon. When defendant came out of the closet, Deputy Reliford put handcuffs on him and explained that he was doing this for "officer safety reasons." Defendant began acting "aggressively" toward Ms. Teixeira and her son and "telling them that he was going to have them removed from the home." Deputy Reliford walked defendant out to the back deck to help him calm down and to be able to talk to him "outside the presence of defendant's girlfriend, the victim." While they were on the back deck, Deputy Carroll left to respond to another call, thus leaving Deputy Reliford alone with defendant, the victim, and her son. On the back deck, Deputy Reliford began asking defendant questions about what had happened. Deputy Reliford did not advise defendant of his *Miranda* rights. Defendant made incriminating statements in response to Deputy Reliford's questions.

Deputy Reliford then asked Ms. Teixeira to come out to the back porch. He observed bruising on her neck and asked how she got the bruises. She stated that defendant put his hand around her neck and picked her up. She also stated that he had pushed her into a wall. Defendant then interjected that he put his hand around Ms. Teixeira's neck and squeezed and that he had pushed her into a wall. Deputy Reliford then placed defendant under arrest.

The trial court granted the motion in part and denied it in part. It concluded that defendant was in custody during his interactions with Deputy Reliford. It therefore suppressed the statements defendant made in response to Deputy Reliford's direct questions. However, it concluded

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that defendant's second statement was "spontaneous," and not made in response to any questions posed to him by Deputy Reliford. It further concluded that asking Ms. Teixeira what happened in front of defendant was not the functional equivalent of interrogation. Therefore, the trial court denied defendant's motion to suppress those statements. It entered a written order finding the facts as summarized above on 26 February 2013.

Defendant entered an *Alford* guilty plea to assault by strangulation on 6 March 2013, but specifically reserved his right to appeal the partial denial of his motion to suppress. The State dismissed the assault on a female charge. On 12 March 2013, the trial court entered judgment sentencing defendant to a mitigated term of 9-20 months imprisonment, suspended for 30 months of supervised probation. That same day, defendant filed written notice of appeal from both the judgment and the order denying his motion to suppress in part.

II. Motion to Suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress his second statement to police because he was subjected to custodial interrogation without the benefit of *Miranda* warnings. He further contends that several of the trial court's findings of fact are unsupported by competent evidence.

A. Standard of Review

It is well-established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. . . . [However,] the trial court's determination of whether an interrogation is conducted while a person is in custody . . . involves reaching a conclusion of law, which is fully reviewable on appeal.

State v. Crudup, 157 N.C. App. 657, 659, 580 S.E.2d 21, 23 (2003) (citations, quotation marks, and brackets omitted). Thus, we must first determine whether there is competent evidence to support the challenged findings of fact. We will then review *de novo* the trial court's conclusion of law as to whether defendant was subject to custodial interrogation. See *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) ("Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely

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substitutes its own judgment for that of the lower tribunal.”(citations and quotation marks omitted)).

B. Findings of Fact

We first address defendant’s challenge to the findings of fact. The trial court found that:

1. The defendant is charged with Assault on a Female and Assault by Strangulation.
2. On September 16, 2012, Deputy R.L. Reliford of the Johnston County Sheriff’s Office responded to a domestic disturbance at [a residence] in Princeton.
3. The residence was the home of defendant and Karen Tiexeira [sic].
4. Upon entering the home, Deputies Paige Carroll and Reliford found defendant hiding in a closet and detained the defendant by putting him in handcuffs when he came out of the closet.
5. The closet in which defendant was hiding contained an engine and various engine parts. The deputies were concerned these objects may have contained a hidden weapon.
6. As the defendant stepped out of the closet, Deputy Reliford informed the defendant to put his hands up and then placed him in handcuffs. Deputy Reliford testified that he told the defendant that he was doing this for officer safety reasons.
7. During the time the defendant had been handcuffed, the defendant was acting aggressively toward his girlfriend and her son by telling them he was going to have them removed from the home.
8. In an effort to calm the defendant down, Deputy Reliford walked the defendant to the back deck to sit down so that he could speak with him about the incident outside the presence of the defendant’s girlfriend, the victim.
9. At this time, Deputy Carroll left the residence in order to respond to another call.
10. After sitting down on the back deck, the defendant made incriminating statements regarding the domestic

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disturbance to Deputy Reliford in response to questioning by Deputy Reliford. Prior to this point, Deputy Reliford had not Mirandized the defendant.

11. Deputy Reliford asked the victim, Karen Tiexara [sic], to come out to the back deck where he observed red marks, swelling and bruising around her neck.

12. Deputy Reliford asked the victim how she got the marks on her neck and she responded by saying that Francis [defendant] put his hand around her neck several times and picked her up while he had his hand around her neck.

13. The victim also stated that the defendant had pushed her into a wall.

14. The defendant then spontaneously stated that he put his hand around . . . [his girlfriend's] neck and squeezed and that he pushed her into the wall.

15. Neither the victim nor Deputy Reliford were speaking to the defendant when he spontaneously uttered this statement.

16. Deputy Reliford then placed the defendant under arrest for Assault on a Female and Assault by Strangulation.

Defendant contends that finding 9 is unsupported by competent evidence because there was no evidence that Deputy Carroll left before defendant's girlfriend was asked to step outside. He also argues that findings 14 and 15 contain conclusions of law in that they characterize his statement as spontaneous. Deputy Carroll testified at the suppression hearing that she remained in the house a short time after defendant had been brought outside before receiving another call and leaving. Deputy Reliford testified that he brought defendant out to the back deck to speak with him and that after speaking about what happened, he opened the door and asked Deputy Carroll to send Ms. Teixeira out. Although the testimony of the officers was somewhat contradictory as to the timing of when Deputy Carroll left, it was proper for the trial court to resolve these evidentiary conflicts. *State v. Jones*, 161 N.C. App. 615, 623, 589 S.E.2d 374, 378 (2003) ("It is the trial court's duty to resolve any conflicts and contradictions that may exist in the evidence." (citation and quotation mark omitted)), *app. dismissed and disc. rev. denied*, 358 N.C. 379, 597 S.E.2d 770 (2004). Moreover, the exact timing of when Deputy Carroll left is not material to the legal issues. It is clear

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that Deputy Carroll left the residence while Deputy Reliford was still trying to investigate what had happened, leaving just one officer with the responsibility of dealing with both defendant and Ms. Teixeira.¹

Defendant also contends that the trial court's characterization of his statements as "spontaneous" were actually conclusions of law, not findings of fact. We agree. The issue of whether defendant's statements were spontaneous or in response to police interrogation is the central legal issue in question, as discussed below. *See State v. Higgs*, 348 N.C. 377, 395, 501 S.E.2d 625, 636 (1998), *cert. denied*, 525 U.S. 1180, 143 L.Ed. 2d 114 (1999). Therefore, we will consider all of the trial court's findings regarding the spontaneity of defendant's statements as conclusions of law.

C. Interrogation or Its Functional Equivalent

Next, we must determine whether the trial court correctly concluded that the questioning of defendant's girlfriend in his presence did not constitute the functional equivalent of questioning and that defendant's statements were spontaneous.

"The *Miranda* warnings and waiver of counsel are required only when an individual is being subjected to custodial interrogation. 'Custodial interrogation' means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Kincaid*, 147 N.C. App. 94, 101, 555 S.E.2d 294, 300 (2001) (citation and quotation marks omitted).

The trial court concluded that defendant was in custody during the entirety of his interactions with police. This determination has not been challenged by either party. The trial court concluded, however, that his statements to police after his girlfriend was brought outside were not in response to police interrogation. Specifically, the trial court concluded that defendant's statements were spontaneous and not in response to police questioning or its functional equivalent.

[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term

1. Deputy Carroll also testified that normally two officers responded to calls for domestic disturbances for officer safety reasons. Deputy Reliford explained that he had previously "taken someone into custody and actually had to fight the other party. So they can get dangerous."

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“interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. 291, 300-02, 64 L.Ed. 2d 297, 307-08 (1980) (footnotes omitted). “Volunteered statements of any kind are not barred by the Fifth Amendment.” *State v. James*, 215 N.C. App. 588, 593, 715 S.E.2d 884, 888 (2011) (citation, quotation marks, and brackets omitted).

Defendant argues that asking his girlfriend what happened in front of him is akin to the coercive techniques discussed in *Innis* and *Miranda*.

The questioned practices [in *Miranda*] included the use of lineups in which a coached witness would pick the defendant as the perpetrator, the so-called ‘reverse line-up’ in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, and a variety of psychological ploys, such as to posit the guilt of the subject, to minimize the moral seriousness of the offense, and to cast blame on the victim or on society.

Arizona v. Mauro, 481 U.S. 520, 526, 95 L.Ed. 2d 458, 466 (1987) (citations, quotation marks, ellipses, and brackets omitted). The *Miranda* court was concerned with the coercive nature of these practices. *In re D.A.C.*, ___ N.C. App. ___, ___, 741 S.E.2d 378, 383 (2013) (noting that “the sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion” (citation, quotation marks, and brackets omitted)).

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Deputy Reliford's questioning of defendant's girlfriend was entirely unlike the coercive interrogation with which *Miranda* and its progeny are concerned. *See State v. Meadows*, 272 N.C. 327, 337, 158 S.E.2d 638, 644-45 (1968) ("The four cases decided by *Miranda* shared salient features, among which was incommunicado interrogation of individuals in a police-dominated atmosphere." (citation and quotation marks omitted)). The deputy was investigating an ongoing situation, attempting to figure out whether a crime was even committed. He asked defendant's girlfriend how she got the marks on her neck. She had not already incriminated defendant. The deputy could not have known what her response could be—she could have inculpated or exculpated defendant. In addition, since Deputy Carroll had to leave to respond to another call, only one officer was left to deal with both defendant and the victim. Although this case is a close one, we conclude that the deputy's question to Ms. Teixeira "did not constitute the functional equivalent of questioning because the officer's [question] did not call for a response from defendant and therefore cannot be deemed as reasonably likely to elicit an incriminating response from defendant." *State v. Gantt*, 161 N.C. App. 265, 269, 588 S.E.2d 893, 896 (2003), *disc. rev. denied*, 358 N.C. 157, 593 S.E.2d 83 (2004); *see also, Meadows*, 272 N.C. at 337, 158 S.E.2d at 645 ("A general investigation by police officers, when called to the scene of a shooting, automobile collision, or other occurrence calling for police investigation, including the questioning of those present, is a far cry from the 'in-custody interrogation' condemned in *Miranda*.").

This case is distinguishable from *State v. Fuller*, 270 N.C. 710, 155 S.E.2d 286 (1967), cited by defendant. In *Fuller*, the police were interviewing the witness to an assault in the presence of the defendant. *Fuller*, 270 N.C. at 713, 155 S.E.2d at 288. The officers warned defendant that anything he said or *did not say* in response to the witness' statement could be used against him. *Id.* at 713-14, 155 S.E.2d at 288. The witness said that the defendant had used a baseball bat to assault the victim. *Id.* at 713, 155 S.E.2d at 288. The officers then asked the defendant if he had anything to say in response. *Id.* The defendant stated, "Yes, I hit the man, but I did not think I hit him that hard." *Id.* The Supreme Court held that the statement was inadmissible because the police had incorrectly informed him that his silence could be used against him. *Id.* at 715, 155 S.E.2d at 289. The Court explained,

To make a prisoner listen to an accuser with the admonition that if he talks or doesn't talk—to be damned if he does, and to be damned if he doesn't—is to put him in an

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impossible position. It violates the rights of the captive audience, which constitutes reversible error.

Id.

This case is distinguishable from *Fuller* in two important respects. First, and perhaps most importantly, the police in *Fuller* directly asked the defendant to respond to the witness' statement. Here, by contrast, Deputy Reliford did not ask defendant to say anything in response to Ms. Teixeira's statement. Second, the officers in *Fuller* warned the defendant that any response **or** *his silence* could be used against him, which "put him in an impossible position." *Id.* There was no such improper warning here. Therefore, we conclude that *Fuller* does not require suppression of defendant's statement.

For the foregoing reasons, we hold that the trial court correctly concluded that defendant's statements in response to those of Ms. Teixeira were spontaneous and not the result of custodial interrogation. The deputy's question of Ms. Teixeira was not the functional equivalent of questioning defendant. Therefore, we affirm the trial court's order denying defendant's motion to suppress these statements.

III. Sentencing

[2] Defendant next argues that the trial court erred in calculating his prior record level because it counted a New Jersey theft conviction as a Class I felony when it is not considered a felony under New Jersey law, and, in any event, should have been classified as a misdemeanor because it is substantially similar to a North Carolina misdemeanor.

Defendant was convicted on 9 February 1995 of fourth degree theft in Morris County, New Jersey. On 21 April 1995, he was convicted of third degree theft and fourth degree theft, also in Morris County, New Jersey. The trial court found that the 9 February 1995 conviction was substantially similar to misdemeanor theft in North Carolina and classified it as a Class 1 misdemeanor. The trial court found that the third degree theft conviction, by contrast, was a felony in New Jersey and classified it as a Class I felony.

Defendant argues that because New Jersey does not use the term "felony" to classify its offenses, the trial court could not properly determine that third degree theft is a felony for sentencing purposes. It is true that the New Jersey criminal code does not use the term "felony." *State v. Smith*, 181 A.2d 761, 767 (N.J. 1962), *cert. denied*, 374 U.S. 835, 10 L.Ed. 2d 1055 (1963). Instead, all crimes are classified as a crime of the first, second, third, or fourth degree. N.J. Stat. Ann. § 2C:43-1

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(2011). Other, more minor offenses are classified as “disorderly person offense[s].” See N.J. Stat. Ann. § 2C:43-8 (2011). Theft may be classified as a second, third, or fourth degree offense, or as a disorderly person offense, depending on the nature of the crime and the value of the property taken. N.J. Stat. Ann. § 2C:20-2 (2011). Defendant was convicted of a third degree theft offense.

Under New Jersey law, a court may sentence a defendant convicted of a third degree offense to a specific term of imprisonment between three and five years. N.J. Stat. Ann. § 2C:43-6 (2011). A crime of the fourth degree is punishable by up to 18 months imprisonment. *Id.* The New Jersey Supreme Court has held that crimes “punishable by imprisonment for more than a year in state prison” are comparable to common law felonies. *State v. Doyle*, 200 A.2d 606, 614 (N.J. 1964). New Jersey courts have clearly recognized that their third-degree crimes are felonies by a different name. See *United States v. Brown*, 937 F.2d 68, 70 (2d Cir. 1991) (“[U]nder New Jersey law, offenses punishable by more than one year in prison constitute common-law felonies.”); *Kaplowitz v. State Farm Mut. Auto Ins. Co.*, 493 A.2d 637, 640 (N.J. Super. Ct. Law Div. 1985) (“[O]ffenses that are punishable by more than one year in state prison should be treated as common law felonies.”).

We recognize that there are several cases in which this Court has decided that New Jersey convictions cannot count as “felonies” for the purpose of habitual felon charges. See, e.g., *State v. Lindsey*, 118 N.C. App. 549, 455 S.E.2d 909 (1995), *State v. Carpenter*, 155 N.C. App. 35, 573 S.E.2d 668 (2002), *disc. rev. dismissed and cert. denied*, 356 N.C. 681, 577 S.E.2d 896 (2003), and *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008). None of these cases analyzes the meaning of “misdemeanor” or “high misdemeanor” under New Jersey law.² They simply conclude that because the crimes were not “certified” as felonies under New Jersey law or called “felonies” they could not be considered felonies for purposes of the habitual felon statute. Applied to the sentencing context, the rule in these cases would suggest that the State can never use a New Jersey conviction to establish prior record points without proving that the offense is substantially similar to a North

2. New Jersey used to classify some serious crimes as misdemeanors or “high misdemeanors.” See, e.g., *State v. Sister*, 827 A.2d 274, 276 (N.J. 2003) (noting that production of child pornography was classified as a “high misdemeanor”). Under the modern statutes, a “high misdemeanor” is equivalent to a crime of the third degree for sentencing, and to a crime of the first, second, or third degree for other purposes. N.J. Stat. Ann. § 2C:43-1(b); N.J. Stat. Ann. § 2C:1-4 (2011). A “misdemeanor” is equivalent to a crime of the fourth degree for sentencing. N.J. Stat. Ann. § 2C:43-1(a).

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Carolina offense. There is no suggestion in the sentencing statutes that the Legislature intended to single out New Jersey convictions for such unfavorable treatment.

Even if we were to assume that we must apply these cases to N.C. Gen. Stat. § 15A-1340.14, this case is distinguishable in that the State presented a “certification” that third degree theft is considered a felony in New Jersey. In *Lindsey*, the first case in which we suggested that a New Jersey offense could not be considered a felony because it was not labeled as such, we hinted that the State could nevertheless show it was a felony by providing certification from some official that it was a felony. *Lindsey*, 118 N.C. App. at 553, 455 S.E.2d at 912.

Here, the State introduced a criminal history record from the “NLETS” system, containing defendant’s “New Jersey Criminal History Detailed Record” (original in all caps). The printout contained a statement that “This record is certified as a true copy of the criminal history record information on file for the assigned state identification number” (original in all caps). The record listed defendant’s theft convictions as “felony conviction[s]” (original in all caps). Therefore, even if the fact that New Jersey considers third degree offenses to be the same as common law felonies is alone insufficient, we hold that this certification is sufficient under *Lindsey*. Moreover, given our review of New Jersey law above, this certification appears to accurately reflect the law as understood by the courts of that state.

Finally, defendant contends that even if third degree theft is a felony in New Jersey, it is substantially similar to misdemeanor larceny in North Carolina and the trial court erred in failing to classify it as a misdemeanor. We disagree.

The principal error in defendant’s argument is that he confuses what he is required to show to prove that an out-of-state felony is substantially similar to a North Carolina misdemeanor. Under N.C. Gen. Stat. § 15A-1340.14(e), if the State establishes that the defendant has an out-of-state felony conviction, it is by default considered a Class I felony, regardless of whether it is substantially similar to a North Carolina felony. *State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009). The State is not required to show any substantial similarity in that context. *Id.* However, the defendant may still show that the out-of-state felony is substantially similar to a North Carolina misdemeanor. N.C. Gen. Stat. § 15A-1340.14(e). The defendant bears the burden of showing substantial similarity in that case. *State v. Crawford*, ___ N.C. App. ___, ___, 737 S.E.2d 768, 770, *disc. rev. denied*, ___ N.C. ___, 743 S.E.2d 196 (2013).

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Here, defendant failed to show that third degree theft in New Jersey is substantially similar to a North Carolina misdemeanor. Essentially, he argues that because third degree theft is not substantially similar to felony larceny in North Carolina, it must be substantially similar to misdemeanor larceny. But that analysis flips the burden of proof. It is defendant who must show that third degree theft is substantially similar to misdemeanor larceny; the State is not required to show that it is more similar to felony larceny than misdemeanor larceny.

New Jersey defines “theft” as the “involuntary transfer of property; the actor appropriates property of the victim without his consent or with consent obtained by fraud or coercion.” *State v. Talley*, 466 A.2d 78, 81 (N.J. 1983) (citation and quotation marks omitted). A person is guilty of third degree theft in New Jersey if

- (a) The amount involved exceeds \$500.00 but is less than \$75,000.00;
- (b) The property stolen is a firearm, motor vehicle, vessel, boat, horse, domestic companion animal or airplane;
- (c) The property stolen is a controlled dangerous substance or controlled substance analog as defined in N.J.S.2C:35-2 and the amount involved is less than \$75,000.00 or is undetermined and the quantity is one kilogram or less;
- (d) It is from the person of the victim;
- (e) It is in breach of an obligation by a person in his capacity as a fiduciary and the amount involved is less than \$50,000.00;
- (f) It is by threat not amounting to extortion;
- (g) It is of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant;
- (h) The property stolen is a person’s benefits under federal or State law, or from any other source, which the Department of Human Services or an agency acting on its behalf has budgeted for the person’s health care and the amount involved is less than \$75,000.00;
- (i) The property stolen is any real or personal property related to, necessary for, or derived from research,

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regardless of value, including, but not limited to, any sample, specimens and components thereof, research subject, including any warm-blooded or cold-blooded animals being used for research or intended for use in research, supplies, records, data or test results, prototypes or equipment, as well as any proprietary information or other type of information related to research;

(j) The property stolen is a New Jersey Prescription Blank as referred to in R.S.45:14-14;

(k) The property stolen consists of an access device or a defaced access device; or

(l) The property stolen consists of anhydrous ammonia and the actor intends it to be used to manufacture methamphetamine.

N.J. Stat. Ann. § 2C:20-2(3).

In North Carolina, a person commits misdemeanor larceny if he takes and carries away the property of another valued less than \$1,000 with the intent to permanently deprive the rightful owner of it, unless one of the circumstances in N.C. Gen. Stat. § 14-72(b) applies, in which case it is a felony regardless of value. N.C. Gen. Stat. § 14-72 (2013); *State v. Sheppard*, ___ N.C. App. ___, ___, 744 S.E.2d 149, 151 (2013). Some of the circumstances of felony larceny are the same both in North Carolina and New Jersey. For instance, in both states, larceny from the person and larceny of a firearm constitute a more serious offense, regardless of value. *See* N.C. Gen. Stat. § 14-72(b)(1), (4); N.J. Stat. Ann. § 2C:20-2 (b) (2)(b), (d). As defendant correctly points out, there are many more ways to commit third degree theft in New Jersey than felony larceny in North Carolina. Yet, that is not the relevant question. Defendant was required to prove that third degree theft is substantially similar to misdemeanor larceny, not that it is dissimilar from felony larceny. Given the disparity in elements between our definition of misdemeanor larceny and New Jersey's definition of third degree theft, defendant cannot show that they are substantially similar.

We hold that the trial court did not err in concluding that third degree theft is not substantially similar to misdemeanor larceny. There are many elements of third degree theft not found in misdemeanor larceny. Several of these possible elements, such as theft from a person, would also make the larceny a felony in North Carolina. Therefore, the

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New Jersey crime of third degree theft is not substantially similar to North Carolina's misdemeanor larceny. In sum, there was no error in defendant's sentencing.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order denying defendant's motion to suppress in part and find no error in sentencing.

AFFIRMED; NO ERROR.

Judges HUNTER, JR., Robert N. and DILLON concur.

STATE OF NORTH CAROLINA
v.
GARRY JEROME JAMISON

No. COA13-1328

Filed 3 June 2014

1. Assault—inflicting serious bodily injury—evidence sufficient—definition given in charge

The trial court did not err by denying defendant's motion to dismiss a charge of assault inflicting serious bodily injury where the evidence was sufficient to show that the victim suffered a serious bodily injury. Review was limited to the evidence presented at trial that supported the definition of serious bodily injury given to the jury. This evidence, particularly the victim's ongoing trouble with her hand and eye, provided substantial evidence of a "permanent or protracted condition that causes extreme pain" and a "permanent or protracted loss or impairment of the functions of a bodily member or organ."

2. Burglary and Unlawful Breaking or Entering—sufficiency of evidence—breakings

There was sufficient evidence of a breaking presented at trial to withstand a motion to dismiss on the charge of first-degree burglary where the uncontroverted testimony at trial established that the screen door was closed and that the victim was attempting to close the front door when defendant forced his way into the home.

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3. Appeal and Error—preservation of issues—issue not raised at trial—misinterpretation of statutory provisions

The merits of defendant’s argument were reviewed on appeal notwithstanding his failure to object at trial where defendant contended that the trial court erred in its interpretation and application of statutory provisions.

4. Sentencing—assault on female—assault inflicting serious bodily injury

Defendant should not have been punished for committing an assault on a female where he was also convicted and sentenced for assault inflicting serious bodily injury. The prefatory clause of N.C.G.S. § 14-33(c) unambiguously bars punishment for assault on a female when the conduct at issue is punished by a higher class of assault.

Appeal by defendant from judgments and commitments entered 12 April 2013 by Judge J. Thomas Davis in Cleveland County Superior Court. Heard in the Court of Appeals 10 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Garry Jerome Jamison (“Defendant”) appeals from judgments and commitments adjudging him guilty of first degree burglary, assault inflicting serious bodily injury, and assault on a female. Defendant contends that the trial court erred in denying his motion to dismiss the charges of assault inflicting serious bodily injury and first degree burglary. Defendant also contends that the trial court erred in allowing him to be convicted of both assault inflicting serious bodily injury and assault on a female based on the same underlying conduct. For the following reasons, we hold that the trial court properly denied Defendant’s motion to dismiss, but erred in convicting and sentencing Defendant for both categories of assault.

I. Factual & Procedural History

The facts of Defendant’s case are not in dispute. Evidence presented at trial showed the following.

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In April or May of 2012, Defendant's nine year relationship with his then-girlfriend, Amber Price, ended. During their relationship, Defendant and Ms. Price had two children together. After their break-up, Defendant moved out and interacted with Ms. Price only to arrange visitation with the children.

On 25 August 2012, however, Defendant telephoned Ms. Price repeatedly in order to see her the following day, Ms. Price's birthday. Ms. Price refused to see Defendant and told him that she was spending time at her parents' house with the children. That evening, while the children were with their grandparents, Ms. Price went to celebrate her birthday at her best friend Brittney Stevens' house. In addition to Ms. Price and Ms. Stevens, Ms. Stevens' two children and the children's father were present at the home.

Around 11:40 p.m., Defendant called Ms. Price demanding that she come get him and spend time with him for her birthday. Ms. Price again refused. Defendant told Ms. Price that if he found out that she was not at home with the children, he would kill her. While Ms. Price believed Defendant's threat to be credible, she remained at the party because she did not think Defendant knew that she was at Ms. Stevens' home. Ms. Price's testimony revealed, however, that she often celebrated her birthday with Ms. Stevens, a fact that was well-known by Defendant.

Sometime around midnight, Ms. Price heard a voice she recognized as Defendant's shouting profanities and making noise outside of Ms. Stevens' home. Upon hearing Defendant's voice, Ms. Price immediately attempted to close the front door to keep Defendant out of the house. Testimony indicated that the screen door was already closed, but not the front door itself. While Ms. Price attempted to close the front door, Defendant forced his way through the door and entered the home. Ms. Price, fearful for her life, attempted to run from Defendant, but could not escape. Defendant grabbed Ms. Price by the hair, knocked her to the ground, and began to beat her.

Meanwhile, Ms. Stevens took her two children and placed them in her car, where they remained with their father during the incident. While outside, Ms. Stevens heard Ms. Price screaming for help. Ms. Stevens went back into the house and attempted to place herself between Defendant and Ms. Price. Defendant continued to kick and beat Ms. Price, but did not harm Ms. Stevens. After the beating, Defendant told Ms. Stevens that it was nothing against her or her family, but that Ms. Price was a "lying bitch." Thereafter, Defendant left the premises and Ms. Stevens called the police. Defendant was subsequently arrested on 6 September 2012.

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On 11 and 12 April 2013, Defendant was tried in Cleveland County Superior Court on charges of first degree burglary, assault inflicting serious bodily injury, and assault on a female. Defendant was convicted of all three crimes. The trial court sentenced Defendant to an active sentence of 64–89 months imprisonment for the first degree burglary. With respect to the assault convictions, Defendant received an additional consecutive sentence of 16–29 months imprisonment, which was suspended by the trial court for 36 months of supervised probation. Defendant gave timely notice of appeal in open court.

II. Jurisdiction

Defendant's appeal from the superior court's final judgments lies of right to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013).

III. Analysis

Defendant challenges the trial court's judgments with three arguments on appeal: (1) that there was insufficient evidence of a "serious bodily injury" presented at trial to support the charge of assault inflicting serious bodily injury; (2) that there was insufficient evidence of a "breaking" to support the charge of first degree burglary; and (3) that the trial court erred in entering a judgment for assault inflicting serious bodily injury and for assault on a female based on the same underlying conduct. We address each of Defendant's arguments in turn.

A. Evidence Supporting a "Serious Bodily Injury"

[1] Defendant contends that the trial court erred in denying his motion to dismiss the charge of assault inflicting serious bodily injury because the evidence presented at trial was not sufficient to show that Ms. Price, in fact, suffered a "serious bodily injury." 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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence

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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 (1995).

The crime of assault inflicting serious bodily injury requires a showing of two elements: “(1) the commission of an assault on another, which (2) inflicts serious bodily injury.” *State v. Williams*, 150 N.C. App. 497, 501, 563 S.E.2d 616, 619 (2002) (quotation marks and citation omitted). Pertinent here, the General Assembly has defined a “serious bodily injury” as a “bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.” N.C. Gen. Stat. § 14-32.4 (2013). In interpreting this statutory language, we have previously held that “the General Assembly intended for N.C.G.S. § 14-32.4 to cover those assaults that are especially violent and result in the infliction of extremely serious injuries.” *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 619. Thus, a “serious bodily injury” as set forth in N.C. Gen. Stat. § 14-32.4 “requires proof of more severe injury than the ‘serious injury’ element of other assault offenses.” *Id.* at 503, 563 S.E.2d at 619–20.

Accordingly, our task in reviewing the record below is to determine whether there is substantial evidence that Ms. Price suffered an injury rising to this level of severity. However, in making this determination, we do not consider the entire definition set forth in N.C. Gen. Stat. § 14-32.4. Rather, “we are limited to that part of the definition set forth in the trial court’s instructions to the jury.” *Id.* at 503, 563 S.E.2d at 620. Here, the trial court instructed the jury as follows:

Serious bodily injury is injury that creates or causes a permanent or protracted condition that causes extreme pain or permanent or protracted loss or impairment of the functions of any bodily member or organ.

“It is well settled that a defendant may not be convicted of an offense on a theory of guilt different from that presented to the jury.” *Id.* Thus, we limit our review to the evidence presented at trial that supports the definition of “serious bodily injury” given to the jury.

Viewing the evidence presented at trial in a light most favorable to the State, we hold that there is substantial evidence that Ms. Price suffered a “serious bodily injury” from Defendant’s assault. Ms. Price testified that the beating left her with broken bones in her face, a broken

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hand, a cracked knee, and an eye so beat up and swollen that she still could not see properly out of it at the time of trial. She indicated that she had a footprint and other bruises on her face, as well as bruises on her neck, stomach, and back. Ms. Price testified that she had “been stomped everywhere.” She reported having to go back to the hospital for a second time because of pain and dizziness. She indicated that her pain lasted for five to six weeks after the attack and that she still had pain in her hand. She stated, “my hand and my eye hurt all of the time.” Photographs of Ms. Price’s injuries were also admitted into evidence to supplement her testimony.

Brittney Stevens also testified concerning Ms. Price’s injuries. Ms. Stevens indicated that the beating left Ms. Price bloody at the scene of the crime. Ms. Stevens reported that Ms. Price wore sunglasses for several weeks to hide bruising and black eyes.

Ms. Price’s mother corroborated the testimony given by Ms. Price and Ms. Stevens and added that Ms. Price had bloodshot eyes and a tooth filling that came loose as a result of the beating. The mother also stated that Ms. Price had trouble writing with her injured hand. Joseph Mullen, Ms. Price’s emergency room physician, characterized Ms. Price’s injuries as “serious.”

We believe the foregoing evidence to be more than sufficient to withstand a motion to dismiss. This evidence, particularly Ms. Price’s ongoing trouble with her hand and eye, provides substantial evidence of a “permanent or protracted condition that causes extreme pain” and a “permanent or protracted loss or impairment of the functions of a bodily member or organ.” Accordingly, Defendant’s argument is without merit.

B. Evidence Supporting a “Breaking”

[2] Defendant’s second argument on appeal is that there was insufficient evidence of a “breaking” presented at trial to withstand a motion to dismiss on the charge of first degree burglary.

Again, in reviewing the sufficiency of the evidence on a motion to dismiss, our task is to determine whether, when viewed in a light most favorable to the State, there is substantial evidence of each element of the offense charged. *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

To warrant a conviction for burglary the State’s evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. If the burglarized

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dwelling is occupied it is burglary in the first degree; if unoccupied, it is burglary in the second degree.

State v. Wilson, 289 N.C. 531, 538, 223 S.E.2d 311, 315 (1976) (internal citations omitted); *see also* N.C. Gen. Stat. § 14-51 (2013). Furthermore, “[i]f any force at all is employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed, there is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present.” *Wilson*, 289 N.C. at 539, 223 S.E.2d at 316 (quotation marks and citations omitted).

Here, uncontroverted testimony at trial established that the screen door was closed and that Ms. Price was attempting to close the front door when Defendant forced his way into the home. Pursuant to *Wilson*, we hold that this testimony provides substantial evidence that a “breaking” occurred.

Defendant acknowledges that this controlling precedent warrants our holding on this issue. Nevertheless, Defendant wishes to preserve this argument for a later appeal to our Supreme Court. Accordingly, we find no error in the trial court’s first degree burglary judgment and note Defendant’s objection for purposes of later appellate review.

C. Judgments and Commitments for Two Categories of Assault

[3] Defendant’s third argument on appeal is that the trial court erred when it sentenced Defendant for assault inflicting serious bodily injury and assault on a female based on the same underlying conduct. Specifically, Defendant argues that the plain language of our assault statutes mandates punishment only for the more serious crime.

At the outset, we acknowledge that “[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1). Here, Defendant admits that he did not object to the trial court entering a consolidated judgment and commitment for both assaults. However, “[w]hen a trial court acts contrary to a statutory mandate, the defendant’s right to appeal is preserved despite the defendant’s failure to object during trial.” *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (quoting *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000)), *cert. denied*, 531 U.S. 1130 (2001). Accordingly, because Defendant contends that the trial court erred in its interpretation and application of statutory provisions, we review the merits of Defendant’s argument notwithstanding his failure to object at trial.

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[4] “Issues of statutory construction are questions of law, reviewed de novo on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). “ ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Assault on a female is a statutory crime in North Carolina:

Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

....

(2) Assaults a female, he being a male person at least 18 years of age[.]

N.C. Gen. Stat. § 14-33(c) (2013) (emphasis added). Defendant argues that the plain language of the prefatory clause contained in this statute, *i.e.*, “[u]nless the conduct is covered under some other provision of law providing greater punishment,” reveals an intent by our General Assembly to limit a trial court’s authority to impose punishment for assault on a female when punishment is also imposed for higher class offenses that apply to the same conduct. Here, because Defendant was also convicted and sentenced for assault inflicting serious bodily injury, a felony, Defendant argues that he should not be punished for committing an assault on a female. *Compare* N.C. Gen. Stat. § 14-33(c) (classifying assault on a female as a Class A1 misdemeanor), *with* N.C. Gen. Stat. § 14-32.4 (classifying assault inflicting serious bodily as a Class F felony). We agree.

As our Supreme Court has stated,

[t]he intent of the Legislature controls the interpretation of a statute. When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction. [C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

State v. Davis, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (second and third alterations in original) (internal quotation marks and citations omitted).

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Here, Defendant's interpretation of the assault on a female statute comports with its plain language. The prefatory clause unambiguously bars punishment for assault on a female when the conduct at issue is punished by a higher class of assault. Furthermore, this interpretation is consistent with previous decisions of our appellate courts dealing with other statutes that contain identical prefatory language. *See, e.g., id.* at 304–05, 698 S.E.2d at 69–70 (collecting cases).

Accordingly, because Defendant was convicted and sentenced for both categories of assault in the court below, the trial court acted contrary to the statutory mandate of N.C. Gen. Stat. § 14-33(c).

IV. Conclusion

For the foregoing reasons, we arrest judgment in 12 CRS 54858 (assault on a female) and remand for resentencing in 12 CRS 54860 (assault inflicting serious bodily injury). Otherwise, we find no error.

Judgment Arrested and Remanded in part; No Error in part.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA

v.

PHILLIP MARK JONES

No. COA13-1181

Filed 3 June 2014

1. Jurisdiction—subject matter—venue—satellite-based monitoring hearing

Defendant's argument in a satellite-based monitoring (SBM) case that the trial court lacked subject matter jurisdiction over him because the State failed to present any evidence that he was a resident of the county in which the hearing was held was dismissed under *State v. Mills*, 754 S.E.2d 674 (2014). The requirement that the SBM hearing be held in the county in which defendant resided related to venue, not subject matter jurisdiction, and defendant's failure to raise the issue before the trial court waived his ability to raise it for the first time on appeal.

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2. Satellite-based monitoring—highest level of supervision and monitoring—additional findings not supported—remaining finding not sufficient

A majority of the trial court’s “additional findings” of fact in a satellite-based monitoring case were not supported by competent evidence. The remaining supported “additional finding[,]” coupled with defendant’s assessment as a “moderate-low” risk for committing another sexual offense, did not support the trial court’s order that he enroll in the highest level of supervision and monitoring.

Appeal by defendant from order entered 7 February 2013, *nunc pro tunc* to 25 January 2013, by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 22 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for defendant.

HUNTER, Robert C., Judge.

Defendant Phillip Mark Jones appeals the order requiring him to enroll in satellite-based monitoring (“SBM”) for the duration of his post-release supervision. On appeal, defendant argues that: (1) the trial court lacked subject matter jurisdiction to order SBM because the State presented no evidence that defendant was a resident of Craven County at the time of the SBM hearing; and (2) the trial court’s “additional findings” supporting the highest possible level of supervision and monitoring were not supported by competent evidence.

After careful review, we reverse the SBM order.

Background

On 15 January 1998, defendant pled guilty to statutory rape; the trial court sentenced him to 173 months to 217 months imprisonment (“the 1998 offense”). While defendant was serving his prison sentence, the North Carolina Department of Public Safety (“DPS”) sent him notice that it had scheduled an SBM determination hearing in Craven County Superior Court after making the initial determination that defendant fell into a category that made him eligible for SBM. DPS claimed that it made that determination based on defendant’s 1998 conviction in Craven County which “involv[ed] the physical, mental, or sexual abuse of a

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minor.” Defendant acknowledged that he received the notice by signing the letter on 9 October 2012.

Prior to the SBM hearing, defendant submitted to a STATIC-99 assessment, the tool used by the Division of Adult Correction for assessing a sexual offender’s likelihood for reoffending. Defendant earned a score of three points, which indicated a “moderate-low” risk of reoffending. The results of the STATIC-99 were submitted to the trial court at defendant’s SBM hearing.

The trial court held the SBM hearing on 25 January 2013. Defendant stipulated that he had received notice of the hearing. As for the prior conviction, the State submitted evidence showing that, in 1994, defendant had been initially charged with first degree sex offense; however, the prosecuting attorney had reduced the charge to assault on a female, to which defendant pled guilty (94 CR 1252) (“the 1994 offense”). In defendant’s file, the trial court noted that there was a 1997 report from Dorothea Dix Hospital evaluating defendant; the psychiatric evaluation was completed before his 1998 trial for statutory rape. Although the trial court reviewed the Dix report, it “ascribe[d] no significance” to it given that it was over fifteen years old. The trial court asked defendant’s probation officer how defendant was “doing” on probation; the officer reported that defendant has reported to all his office appointments, has not missed a curfew, and has been paying the money he owes.

On a standard, preprinted AOC form, the trial court made the following findings: (1) defendant was convicted of a reportable conviction; (2) defendant fell into at least one of the categories requiring SBM; (3) the District Attorney scheduled a hearing in the county in which defendant resided and provided adequate notice of the hearing; and (4) defendant’s 1998 conviction involved the physical, mental, or sexual abuse of a minor. The trial court made two “additional findings”: (1) there was a short period of time from the conclusion of defendant’s supervision for the “prior sexual offense” in 94 CR 1252 to reoffending (“additional finding no. 1”); and (2) there was a similarity between the victims in both age and sex (“additional finding no. 2”). Based on these “additional findings,” the trial court ordered that defendant enroll in the highest possible level of supervision and monitoring until his post-release supervision ended for the 1998 offense (at some point in October 2017). Defendant filed timely notice of appeal.

Standard of Review

For SBM enrollment, “the trial court is statutorily required to make findings of fact to support its legal conclusions.” *State v. Morrow*,

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200 N.C. App. 123, 126, 683 S.E.2d 754, 757 (2009), *aff'd per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010). On appeal, this Court “review[s] the trial court’s findings of fact to determine whether they are supported by competent record evidence[.]” *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009). Moreover, the Court reviews 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. Clark*, 211 N.C. App. 60, 70, 714 S.E.2d 754, 761 (2011).

Arguments**I. Subject Matter Jurisdiction**

[1] First, defendant argues that the trial court lacked subject matter jurisdiction over him to order SBM. Specifically, defendant contends that the State failed to present any evidence that defendant was a resident of Craven County at the time of the hearing; therefore, the trial court’s finding that the hearing was held in the county of defendant’s residence was not supported by competent evidence. Based on *State v. Mills*, ___ N.C. App. ___, 754 S.E.2d 674 (2014), we dismiss defendant’s argument.

Pursuant to N.C. Gen. Stat. § 14-208.40B(b), “[i]f the [DOC] determines that the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a), the district attorney, representing the [DOC], shall schedule a hearing in superior court for the county in which the offender resides.” Defendant argues that although he did not challenge the location of the hearing before the trial court, this issue may be raised for the first time on appeal since it addresses subject matter jurisdiction.

In support of his argument, defendant cites two unpublished cases. However, this Court’s recent published opinion in *Mills*, is controlling. In *Mills*, the defendant did not argue at his SBM hearing that it was not being held in the county of his residence. On appeal, the defendant contended that: (1) he could raise this issue for the first time on appeal because it involved subject matter jurisdiction; and (2) there was no competent evidence presented at the hearing that defendant resided in Buncombe County, where the SBM hearing occurred. *Id.* at ___, 754 S.E.2d at 677. After noting that SBM hearings are civil in nature, the *Mills* Court rejected the defendant’s characterization of his argument as one challenging subject matter jurisdiction; instead, the Court concluded that “while the superior court has subject matter jurisdiction over SBM hearings, the requirement that the hearing be held in the superior court in the county in which the offender resides relates to venue.” *Id.* Thus, the defendant could not raise his venue challenge for the first time on appeal because it had been waived. *Id.*

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Similarly, here, when defendant stipulated that he had received notice of the hearing, he did not raise any argument that he was not a resident of Craven County. Because the requirement that the SBM hearing be held in the county in which defendant resided relates to venue, not subject matter jurisdiction, *id.*, defendant's failure to raise the issue before the trial court waived his ability to raise it for the first time on appeal, and this argument is dismissed.

II. The “Additional Findings”

[2] Next, defendant challenges the two “additional findings” the trial court made in requiring defendant enroll in the highest level of supervision and monitoring. Specifically, with regard to “additional finding no. 1,” defendant contends that there was no evidence that defendant had committed a “prior sexual offense” or that the present offense was committed within a “short period of time from [the] conclusion of supervision” for the 1994 conviction of assault on a female. Additionally, defendant alleges that there was no evidence presented that the victims in the 1994 and 1998 offenses were similar in age and sex, which was noted in the trial court's “additional finding no. 2.” Consequently, defendant argues that because these findings were not supported by competent evidence and defendant was assessed as a “moderate-low” risk, the trial court erred in ordering him to enroll in the highest level of supervision and monitoring. We agree.

“This Court has previously held that a DOC risk assessment of ‘moderate,’ *without more*, is insufficient to support the finding that a defendant requires the highest possible level of supervision and monitoring.” *State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011) (quoting *Kilby*, 198 N.C. App. at 369–70, 679 S.E.2d at 434). A trial court may order a defendant receive the highest level of supervision and monitoring if it “makes ‘additional findings’ regarding the need for the highest possible level of supervision and where there is competent record evidence to support those additional findings.” *Id.* (citing *State v. Morrow*, 200 N.C. App. 123, 130–34, 683 S.E.2d 754, 760–62 (2009), *aff'd per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010)). However, if a defendant is assessed as a “moderate” risk and the State presented no evidence to support findings of a higher level of risk or to support the requirement for “the highest possible level of supervision and monitoring[,]” the trial court's order must be reversed. *Kilby*, 198 N.C. App. at 370–71, 679 S.E.2d at 434. In contrast, if the State presented any evidence at the SBM hearing that would support the highest level, “it would be proper to remand this case to the trial court to consider the evidence and make additional findings.” *Id.* at 370, 679 S.E.2d at 434.

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A. “Additional Finding No. 1” – Short Period of Time between Conclusion of Supervision for Defendant’s “Prior Sexual Offense” and Reoffending

First, defendant contends that there was no competent evidence introduced at the hearing to support the trial court’s finding that defendant was convicted of a “prior sexual offense” or that the 1998 offense was committed within a short period of time from the conclusion of supervision for the 1994 offense.

At the SBM hearing, the State introduced evidence that, although defendant had initially been charged with first degree sex offense in 1994 (94 CR 1252), that charge was reduced and defendant pled guilty to assault on a female. The crime of assault on a female is not a sexual offense, a point which the State concedes. Therefore, that part of the trial court’s finding—that defendant had been convicted of a “prior sexual offense”—was not supported by competent evidence.

With regard to defendant’s contention that there was no competent evidence presented to support the trial court’s “additional finding” that there was a short period of time between the conclusion of his probation for the 1994 nonsexual offense before he committed the 1998 sexual offense, his argument is without merit. Initially, it should be noted that the trial court classified defendant’s probation as “supervised” for the 1994 offense. However, there is no evidence in the record to support this classification; the ACIS print-out submitted to the trial court for defendant’s 1994 offense only indicated that defendant received three years of probation. Notwithstanding this classification, the ACIS print-out clearly indicated that defendant was sentenced to two years imprisonment on 30 March 1994 for assault on a female, but that sentence was suspended and defendant was placed on three years of probation. The offense date for the 1998 sexual offense was 19 August 1997, approximately three years and five months after defendant was sentenced for the 1994 nonsexual offense. While defendant is correct in that it is not exactly clear when defendant ended his probation for the 1994 offense, the print-out supports a finding that a short amount of time elapsed between the end of probation for the 1994 offense, sometime around April 1997, and the date of offense for the 1998 conviction, August 1997. Accordingly, part of “additional finding no. 1”—that defendant committed the 1998 offense soon after his probation for the 1994 offense ended—was supported by competent evidence. Thus, it may be considered when determining whether the trial court’s determination that defendant requires the highest level of supervision and monitoring “reflect[s] a correct application of law to the facts found.” *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432.

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B. “Additional Finding No. 2” – “Similarity in Victims’ Age and Sex”

Initially, it should be noted that the State concedes, and we agree, that the trial court’s “additional finding no. 2”—similarity of victims in age and sex—was not supported by competent record evidence because the only documents establishing this finding were the 1997 Dorothea Dix documents. Citing *State v. Mixion*, 110 N.C. App. 138, 150, 429 S.E.2d 353, 370 (1993), since those documents were not offered into evidence before the trial court nor did defendant stipulate to their contents, the State concedes that the evidence was insufficient to support this finding. Therefore, it may not provide support for the trial court’s determination that defendant required the highest level of monitoring and supervision.

C. Does the Evidence that Defendant Committed the 1998 Offense Within a Short Period After Completing Probation for the 1994 Nonsexual Offense Along with his “Moderate-Low” Risk of Reoffending Support the Trial Court’s Determination That Defendant Required the Highest Level of Supervision and Monitoring?

Finally, we must determine whether the “additional finding” that there was a short period of time between the end of probation for the 1994 offense, a nonsexual offense, and committing a sexual offense supports the conclusion that defendant requires the highest possible level of supervision and monitoring. We conclude that this “additional finding” does not, and the trial court’s determination is “not a correct application of the law to the facts found,” *Id.* at 367, 679 S.E.2d at 432. A defendant’s “risk of reoffending” is based on the risk of the defendant committing another sexual offense. Here, the only conviction that the trial court may use in assessing defendant’s risk of reoffending is the 1998 offense since that offense constitutes the only sexual offense defendant was convicted of; in contrast, the 1994 offense was a nonsexual offense and does not indicate any increased risk that he would commit another sexual offense. Consequently, this finding does not support a conclusion that defendant is at a high risk of reoffending and does not support a conclusion that defendant requires the highest possible level of supervision and monitoring.

Furthermore, we conclude that the State presented no other evidence to support the trial court’s determination. *See id.* (noting that if “evidence was presented which could support findings of fact which could lead to a conclusion that ‘the defendant requires the highest possible level of supervision and monitoring[,]’ . . . it would be proper to

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remand this case to the trial court to consider the evidence and make additional findings”). The fact that defendant was originally charged with a sexual offense, established by the ACIS print-out indicating this initial charge, but pled to the lesser, nonsexual offense of assault on a female would not support a determination that defendant required the highest level of supervision and monitoring. In other words, the underlying facts of the 1994 offense may not be considered by the trial court in determining the level of supervision and monitoring a defendant requires for purposes of SBM. In support of this conclusion, we note that this Court has repeatedly held that the underlying facts of a defendant’s conviction may not be used to determine whether the defendant committed an aggravated offense under section 14-208.6(1a). *See State v. Boyett*, ___ N.C. App. ___, ___, 735 S.E.2d 371, 380 (2012) (“In determining whether a particular crime constitutes an aggravated offense, 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 giving rise to the conviction.”) (internal quotation marks omitted); *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009) (“[W]hen making a determination 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 giving rise to the conviction.”). Thus, applying this analysis, we hold that the trial court may only consider the offense of which a defendant was convicted for purposes of determining what level of supervision and monitoring a defendant requires for SBM.

In summary, since the State presented no other evidence which could tend to support a determination of a higher level of risk that would require the highest level of supervision and monitoring other than his STATIC-99 score of moderate-low risk, the trial court’s order must be reversed. *See Kilby*, 198 N.C. App. at 370-71, 679 S.E.2d at 434 (reversing the SBM order when the State presented no evidence which tended to support a determination of a higher level of risk than the ‘moderate’ rating assigned by the DOC). In fact, it should be noted that the only other evidence submitted at the SBM hearing supported the opposite conclusion. Specifically, defendant’s probation officer indicated that defendant was fully cooperating with his post-release supervision, which might support a finding of a lower risk level, but not a higher one. Additionally, although he had not found work at the time of the SBM hearing, he was living with his mother and father, and his father attended the hearing, indicating some familial support. Thus, given that the only “additional finding” supported by competent evidence—that defendant committed the 1998 sexual offense shortly after ending probation for the 1994

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nonsexual offense—would not support a higher level of risk and that the State presented no other evidence showing that defendant required the highest level of monitoring and supervision, we reverse the trial court’s SBM order.

Conclusion

Because the State presented no evidence other than defendant’s moderate-low STATIC-99 risk assessment to support a finding that defendant required the highest level of supervision and monitoring, we reverse the SBM order.

REVERSED.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA

v.

KALAN JOHN LUCAS, DEFENDANT

STATE OF NORTH CAROLINA

v.

SHAQUILLE OQKWONE RICHARD, DEFENDANT

No. COA13-784

Filed 3 June 2014

1. Burglary and Unlawful Breaking or Entering—second-degree—evidence of entry—insufficient

Defendants’ convictions for second-degree burglary were vacated where the evidence failed to raise more than a mere suspicion or conjecture that defendants entered the home.

2. Burglary and Unlawful Breaking or Entering—second-degree—insufficient evidence of entry—sufficient evidence of intent—felonious breaking or entering

A conviction for second-degree burglary was remanded for entry of judgment on felonious breaking or entering where there was insufficient evidence of entry into the home but sufficient evidence of defendants’ intent to commit a felony. The State’s failure to prove that either defendant actually entered the home, in no way

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detracted from the sufficiency of the evidence of defendants' intent to commit a felony within the residence.

3. Burglary and Unlawful Breaking or Entering—instructions—failure to charge on first-degree trespass

Defendants did not demonstrate that the trial court's failure to instruct the jury regarding first-degree trespass in a burglary and breaking or entering prosecution was error, much less plain error, where the evidence did not permit a reasonable inference disputing the State's contention that defendants intended to commit a felony.

4. Larceny—instructions—failure to define—no plain error

Although defendants contended that the trial court committed plain error by failing to define larceny to the jury, given that the State's case identified larceny as the specific felony that defendants intended to commit, the jury did not need a formal definition of the term larceny. There was evidence permitting the inference that defendants intended to steal property and there was no evidence suggesting that defendants intended to merely borrow the property.

5. Damages and Remedies—restitution—evidence not sufficient to support award

Restitution orders were remanded where defendants contended that the evidence was not sufficient evidence to support the award and the State conceded error.

6. Constitutional Law—effective assistance of counsel—failure to request instructions

Defense counsel's failure to request a jury instruction defining larceny and an instruction on first-degree trespass did not constitute ineffective assistance of counsel in a prosecution for second-degree burglary. It was determined elsewhere in the opinion that the trial court did not commit plain error in its instructions to the jury.

Appeal by defendants from judgments entered 27 March 2013 by Judge Reuben F. Young in Cumberland County Superior Court. Heard in the Court of Appeals 11 December 2013.

Roy Cooper, Attorney General, by Richard H. Bradford, Special Deputy Attorney General, and Susannah P. Holloway, Assistant Attorney General, for the State.

Unti & Lumsden LLP, by Margaret C. Lumsden, for defendant-appellant Lucas.

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Guy J. Loranger for defendant-appellant Richard.

DAVIS, Judge.

Co-defendants Kalan John Lucas (“Lucas”) and Shaquille Oqkwone Richard (“Richard”) (collectively “Defendants”) appeal from their convictions for second-degree burglary and conspiracy to commit second-degree burglary. On appeal, Defendants argue that the trial court erred in (1) denying their motions to dismiss the second-degree burglary charges for insufficient evidence; (2) failing to instruct the jury regarding the definition of larceny and on the offense of first-degree trespass; and (3) entering a restitution order that was not supported by competent evidence. Defendants also contend that their trial counsel provided ineffective assistance of counsel by failing to request the above-referenced jury instructions. After careful review, we vacate Defendants’ convictions for second-degree burglary and remand for resentencing for felonious breaking or entering. We also vacate the trial court’s restitution orders and remand to the trial court for rehearing on that issue.

Factual Background

The State presented evidence at trial which tended to establish the following facts: On 27 November 2011 at approximately 2:30 a.m., Nina Moore (“Mrs. Moore”) awoke to the sound of “erratic knocking” and the doorbell ringing at the front door of the home in Fayetteville, North Carolina that she shared with her husband, Lynard Moore (“Mr. Moore”). From a window, Mrs. Moore observed a man wearing a dark-colored hooded sweatshirt standing at the front door. Mrs. Moore also saw another man sitting in the driver’s seat of a white car parked outside their home. Mrs. Moore woke up Mr. Moore and informed him that there was someone at the door and that she thought “he needed to get his gun.” Mr. Moore retrieved a gun from their safe, proceeded down the hallway, and saw that the front door had been kicked open. Mr. Moore fired three or four shots into the front entranceway. At that point, a man ran out of the house and jumped into a white car, which Mr. Moore identified as a Mercury Grand Marquis. The car then “sped away” out of the Moores’ neighborhood.

Mrs. Moore called the police and informed them what had occurred. Officer Leonard Honeycutt (“Officer Honeycutt”) of the Fayetteville Police Department arrived at the Moores’ home, took statements from Mr. and Mrs. Moore, and issued a “be on the lookout” for a white Mercury Grand Marquis and a man wearing a “dark hoody or toboggan” and dark tennis shoes. Shortly thereafter, Officer Honeycutt received a dispatch

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regarding “a suspicious white vehicle” parked in front of a residence on Windlock Drive in a neighborhood approximately two miles away from the Moores’ home.

Steven Pavel (“Mr. Pavel”) was sitting on the front porch of his home on Birchcreft Drive when he noticed a white sedan approaching the corner of Birchcreft Drive and Windlock Drive. The driver parked the car, and the vehicle’s two occupants remained inside the vehicle for several minutes. Mr. Pavel then witnessed two men exit the vehicle and approach “the first house off from the corner.” Because Mr. Pavel believed that the men’s actions seemed suspicious, he went inside and observed them through his window. When the men “start[ed] to walk up to the first house, casing the house and all,” Mr. Pavel called 911. Mr. Pavel observed the men walk past the first home, which was vacant, and attempt to open the door of a vehicle that was parked in the next driveway.

The men then approached the second house, which was also unoccupied due to the fact that the owners, Wesley Meredith and Jennifer Meredith (collectively “the Merediths”), were out of town. It appeared to Mr. Pavel that one of the men was trying to strike the side patio door of the Merediths’ home.

Mr. Pavel remained on the phone with the 911 dispatcher and related that the men had walked back down the driveway and reentered their car. After sitting in the car for several minutes, the men exited the vehicle again and walked around to the back of the Merediths’ house. A few minutes later, Mr. Pavel saw both men “running around from the back of the house.” The men then jumped into their car and sat there for several minutes. Officer Honeycutt and Officer Michael Tackema (“Officer Tackema”) arrived at the scene and apprehended the two men. At trial, Officers Honeycutt and Tackema identified these men as Defendants.

Officers Honeycutt and Tackema detained and searched both Defendants, and Officer Honeycutt found tube socks in their vehicle, which he noted were “very common for breaking and entering artists and thieves to put on their hands” because they were less conspicuous than gloves. Officers Honeycutt and Tackema then proceeded to inspect the area surrounding the home. They observed that the outer pane of a double-pane sliding glass door on the side of the house had been shattered. A fire pit bowl and two concrete landscaping bricks were lying on the ground near a back bedroom window that was also shattered. Several similar bricks were lying on the floor inside the bedroom where the window had been broken. There was soot covering the fire pit bowl and the back bedroom window, and the blinds hanging from that

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window were “somewhat ajar.” The officers did not detect any soot on Defendants or their vehicle but did locate a shard of glass on Lucas’s person that appeared to be similar to the glass found at the scene.

Defendants were subsequently charged with first-degree burglary and conspiracy to commit first-degree burglary at the Moores’ residence and second-degree burglary and conspiracy to commit second-degree burglary at the Merediths’ residence. The matter came on for a jury trial on 25 March 2013 in Cumberland County Superior Court. On 27 March 2013, the jury returned verdicts finding Defendants (1) not guilty of first-degree burglary or conspiracy to commit first-degree burglary; and (2) guilty of second-degree burglary and conspiracy to commit second-degree burglary. The trial court entered judgments on the jury’s verdicts, sentencing Defendants to a presumptive-range term of 13 to 16 months imprisonment for second-degree burglary and a consecutive presumptive-range term of 6 to 8 months imprisonment for conspiracy to commit second-degree burglary. Defendants gave notice of appeal in open court.

Analysis

I. Motion to Dismiss

[1] Defendants first argue that the trial court erred in denying their motion to dismiss the second-degree burglary charges. Specifically, Defendants contend that the evidence presented at trial was insufficient to show the elements of (1) entry; and (2) intent to commit a felony.

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 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).

To survive a defendant’s motion to dismiss a charge of second-degree burglary, the State must provide substantial evidence that the defendant committed a (1) breaking (2) and entering (3) of an unoccupied dwelling

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house or sleeping apartment of another (4) in the nighttime (5) with the intent to commit a felony therein. *State v. Brown*, ___ N.C. App. ___, ___, 732 S.E.2d 584, 586-87 (2012); N.C. Gen. Stat. § 14-51 (2013). Because Defendants only challenge the sufficiency of the evidence regarding entry and intent to commit a felony, we limit our analysis to those two elements. *See State v. Davis*, 198 N.C. App. 146, 151, 678 S.E.2d 709, 713-14 (2009) (explaining that where defendant challenges sufficiency of evidence as to some elements “but does not challenge the State’s evidence of the other elements of the crime,” this Court examines only the sufficiency of the evidence concerning the challenged elements).

[E]ntry, for the purposes of burglary, is committed by the insertion of any part of the body for the purpose of committing a felony. Thus, an entry is accomplished by inserting into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony

State v. Bumgarner, 147 N.C. App. 409, 415, 556 S.E.2d 324, 329 (2001) (citation, quotation marks, and brackets omitted).

Our Supreme Court has further explained that “entry is the act of going into the place *after a breach has been effected*,” *State v. Gibbs*, 297 N.C. 410, 418, 255 S.E.2d 168, 174 (1979) (citation and quotation marks omitted and emphasis added), and that “the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense,” *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 756 (2008) (citation and quotation marks omitted).

In *State v. Watkins*, ___ N.C. App. ___, 720 S.E.2d 844, *disc. review denied*, ___ N.C. ___, 724 S.E.2d 509 (2012), the defendant argued that the evidence presented at trial showing that he and his accomplice used the end of a shotgun to break a townhouse window, heard movement within the residence, and immediately fled the scene was insufficient to establish the entry element of burglary. We agreed, explaining that the entry element requires the defendant to “either physically enter the residence, however slight, or commit the burglary by virtue of [an] instrument.” *Id.* at ___, 720 S.E.2d at 849 (citation, quotation marks, and brackets omitted). We further noted that to constitute an entry through the use of an instrument, the instrument itself must be “used to commit a felony within the residence” rather than merely to make an opening into the residence. *Id.* at ___, 720 S.E.2d at 849. Consequently, our analysis of North Carolina case law as well as leading treatises on criminal law led us to conclude that

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the fact that defendant broke a window of the residence in the nighttime with an instrument — even if the instrument itself crossed the threshold — is not sufficient to find him guilty of burglary. . . . [V]iewing the evidence in the light most favorable to the State, it appears only that defendant broke a window of the residence with an instrument to facilitate a subsequent entry. Such evidence does not support the trial court’s submitting a case of burglary to the jury.

Id. at ___, 720 S.E.2d at 850.

We believe that the evidence in the present case compels the same result. At trial, the State introduced circumstantial evidence tending to show that Defendants used landscaping bricks and a fire pit bowl to break a back window of the Merediths’ home. Although there was soot covering the fire pit bowl and the broken window, law enforcement officers did not find soot on the person of either Defendant or within the interior of the home. Several landscaping bricks were found inside the bedroom where the window had been broken, but there was no evidence that anything within the home had been tampered with or was missing.

While Officer Honeycutt testified that the blinds hanging from the broken window were “somewhat ajar” and “parted enough that entry could have been made with a hand or body part,” the State neither offered evidence that Defendants had *actually crossed* the threshold of the home nor introduced evidence permitting a reasonable inference of such actual entry. The lack of evidence on this issue distinguishes the present case from *State v. Salters*, 137 N.C. App. 553, 528 S.E.2d 386, *cert. denied*, 352 N.C. 361, 544 S.E.2d 556 (2000), in which we held that evidence of a splintered door frame and broken lock in the residence at issue coupled with testimony that a suitcase discovered to be missing from inside the residence was seen in the defendant’s possession was sufficient to allow the inference that the defendant had entered the home. *Id.* at 557, 528 S.E.2d at 390.

Nor did the State provide evidence that the landscaping bricks found inside the home were used for a purpose beyond creating an opening in the window. *See Watkins*, ___ N.C. App. at ___, 720 S.E.2d at 849 (“[W]here the State’s evidence seeks to establish an entry by the defendant’s use of an instrument, the defendant can only be guilty of burglary if the instrument that crossed the threshold was itself used to commit a felony within the residence.”). Although a shard of glass was discovered on Lucas’s person, we cannot agree with the State’s contention that

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this amounted to substantial evidence of entry where law enforcement officers testified that there was glass “all over the ground” outside the Merediths’ residence.

As such, we believe that this evidence failed to raise more than a mere suspicion or conjecture that Defendants entered the home. See *State v. McDowell*, ___ N.C. App. ___, ___, 720 S.E.2d 423, 424 (2011) (“A motion to dismiss should be granted . . . when the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant’s guilt.” (citation and quotation marks omitted)). Accordingly, we vacate Defendants’ convictions for second-degree burglary.

[2] However, because we conclude, for the reasons discussed below, that there was sufficient evidence to establish Defendants’ intent to commit a felony, we remand to the trial court for entry of judgment on felonious breaking or entering. “To support a conviction for felonious breaking [or] entering under N.C. Gen. Stat. § 14-54(a), there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein.” *State v. Jones*, 188 N.C. App. 562, 564-65, 655 S.E.2d 915, 917 (2008) (citation, quotation marks, and brackets omitted); see *Watkins*, ___ N.C. App. at ___, 720 S.E.2d at 850 (“For conviction of felonious breaking or entering, a violation of G.S. 14-54(a), it is not necessary that the State show both a breaking and an entering; proof of either is sufficient if committed with the requisite felonious intent.”); *State v. Barnett*, 113 N.C. App. 69, 75-76, 437 S.E.2d 711, 715 (1993) (concluding that although evidence was insufficient to sustain burglary conviction, jury — in convicting defendant of burglary — “necessarily found facts which establish felonious breaking [or] entering, i.e., the breaking [or] entering of a building with intent to commit any felony or larceny therein”).

“Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.” *State v. Baskin*, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 475, 666 S.E.2d 648 (2008). Intent to commit a felony may be inferred from the defendant’s acts and conduct during the subject incident. *State v. Allah*, ___ N.C. App. ___, ___, 750 S.E.2d 903, 907 (2013).

Here, the State offered testimony from Mr. Pavel describing Defendants’ behavior during the incident. Mr. Pavel explained that Defendants were “casing” the neighborhood and “pull[ing] on the door

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handles” of cars that were parked in driveways. Mr. Pavel testified that he described their conduct as “casing” to the 911 dispatcher because “it’s just not normal activity for someone to be walking from house to house to see if it’s occupied or not” or to try to open the doors of various cars parked in the driveways.

A “fundamental theory” in the context of both burglary and breaking or entering is that absent “evidence of other intent or explanation for breaking and entering . . . the usual object or purpose of burglarizing a dwelling house at night is theft.” *State v. Hedrick*, 289 N.C. 232, 236, 221 S.E.2d 350, 353 (1976) (citation and quotation marks omitted); see *State v. McBryde*, 97 N.C. 393, 396, 1 S.E. 925, 927 (1887) (“The intelligent mind will take cognizance of the fact that people do not usually enter the dwelling of others in the night-time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and, when there is no explanation or evidence of a different intent, the ordinary mind will infer this also.”).

Although — as discussed above — the State failed to prove that either Defendant actually entered the home, we do not believe that this in any way detracts from the sufficiency of the evidence regarding Defendants’ intent to commit a felony within the residence. Because a reasonable juror could infer from Defendants’ conduct that they broke the back bedroom window with the intent to commit the felony of larceny once inside, we hold that there was substantial evidence of felonious intent and that the entry of judgment on felonious breaking or entering is appropriate. As such, we remand to the trial court “for the pronouncement of a judgment as upon a verdict of guilty of felonious breaking or entering.” *Watkins*, ___ N.C. App. at ___, 720 S.E.2d at 850 (citation, quotation marks, and brackets omitted).¹

1. In addition to challenging his conviction for second-degree burglary, Defendant Richard also argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to commit second-degree burglary based on the insufficiency of the evidence regarding entry and intent to commit a felony. However, he offers no argument that the State failed to prove that there was an agreement or understanding between him and Lucas to commit second-degree burglary. See *State v. Dalton*, 122 N.C. 666, 672, 471 S.E.2d 657, 661 (1996) (“A criminal conspiracy is an agreement between two or more people to commit a substantive offense.”); *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (“It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime.”), cert. denied, 312 N.C. 88, 321 S.E.2d 907 (1984). Because he does not challenge the sufficiency of the evidence of such an agreement between him and Lucas and because completion of the substantive offense is not necessary for a conviction of conspiracy to commit second-degree burglary, Defendant Richard’s argument on this issue is overruled.

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II. Jury Instructions

In its charge to the jury, the trial court gave instructions regarding second-degree burglary, felonious breaking or entering, and misdemeanor breaking or entering. The trial court did not instruct the jury on the offense of first-degree trespass, and Defendants contend that the failure to give such an instruction constituted error. Defendants also assert that the trial court erred by failing to expressly define the crime of larceny when it instructed the jury that second-degree burglary is the breaking and entering into an unoccupied dwelling house without the consent of the owners during the nighttime with the intent “to commit a felony or larceny therein.” Defendants acknowledge that they did not object to the trial court’s instructions and are, therefore, limited to plain error review on appeal. Under plain error review, Defendants bear the burden of showing that “the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 333 (2012) (citation and quotation marks omitted).

A. Failure to Instruct on First-Degree Trespass

[3] First-degree trespass is a lesser-included offense of felonious breaking or entering. *State v. Owens*, 205 N.C. App. 260, 266, 695 S.E.2d 823, 828 (2010). Unlike felonious breaking or entering, first-degree trespass does not include the element of felonious intent but rather merely requires evidence that the defendant entered or remained on the premises or in a building of another without authorization. N.C. Gen. Stat. § 14-159.12 (2013).

A trial court “must submit a lesser-included offense to the jury when, and only when, there is evidence from which the jury can find that the defendant committed the lesser-included offense.” *State v. Liggons*, 194 N.C. App. 734, 742, 670 S.E.2d 333, 339 (2009) (citation, quotation marks, and brackets omitted). “The trial court is not . . . obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State’s contention.” *State v. Hamilton*, 132 N.C. App. 316, 321, 512 S.E.2d 80, 84 (1999). In *Hamilton*, this Court concluded that the trial court was not required to submit the lesser-included offense of first-degree trespass to the jury in the defendant’s trial for felonious breaking or entering because the defendant “did not testify or present any evidence that he broke or entered for any non-felonious purpose.” *Id.* at 321, 512 S.E.2d at 85.

As in *Hamilton*, the evidence in the present case does not permit a reasonable inference that would dispute the State’s contention that

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Defendants intended to commit a felony. There was no evidence presented that supported an alternative explanation for Defendants' presence at the Merediths' home. Thus, in the absence of any evidence disputing the State's theory that Defendants "cased" the neighborhood and shattered the Merediths' window in the hope of stealing from the home, Defendants have not demonstrated that the trial court's failure to instruct the jury regarding first-degree trespass was error — much less plain error.

B. Failure to Define Larceny

[4] Citing *State v. Foust*, 40 N.C. App. 71, 251 S.E.2d 893 (1979), Defendants contend that the trial court committed plain error by failing to define larceny to the jury given that the State's case identified larceny as the specific felony that Defendants intended to commit. In *State v. Simpson*, 299 N.C. 377, 261 S.E.2d 661 (1980), however, our Supreme Court held that this Court's ruling in *Foust* — that the trial court's failure to define larceny in a burglary prosecution premised on intent to commit larceny was prejudicial and required a new trial — was "too broad" and that "[t]he extent of the definition [of larceny] required depends upon the evidence in the particular case." *Id.* at 384, 261 S.E.2d at 665.

In this case, the evidence established that in the early morning hours of 27 November 2011, Defendants were "casing" houses and attempting to gain entry into vehicles in various driveways. Defendants' behavior, as witnessed by Mr. Pavel, indicated that they were examining the homes and vehicles so that they could steal property from them. No evidence was offered to suggest that Defendants' conduct was motivated by some other purpose or plan or that Defendants were looking for property to which they had some bona fide claim of right. *See id.* at 384, 261 S.E.2d at 665 ("In the case before us, there was no necessity for any definition or explanation of the word 'larceny' because there was no evidence suggesting that the [stolen property] was borrowed, or taken for some temporary purpose, or otherwise negating a taking with felonious intent to steal."). Thus, because there was evidence presented at trial permitting the inference that Defendants intended to steal property and there was no evidence suggesting that Defendants intended to merely borrow the property, we are satisfied that "the jury did not need a formal definition of the term 'larceny' to understand its meaning and to apply that meaning to the evidence." *Id.* (concluding that term "larceny" may be used as shorthand statement of its definition, i.e., to steal or to take and carry away goods of another with intent to permanently deprive owner of those goods where there is no "direct issue as to the intent or purpose of the taking" (citation and quotation marks omitted)).

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As such, we conclude that “[t]he use of the word ‘larceny’ as it is commonly used and understood by the general public was sufficient in this case to define for the jury the requisite felonious intent needed to support a conviction” and that “[t]here is no reasonable possibility that [the] failure to define ‘larceny’ contributed to defendant’s conviction or that a different result would have likely ensued had the word been defined.” *Id.* Consequently, Defendants have failed to meet their burden of establishing plain error.

III. Restitution

[5] Defendants next contend that the trial court erred in ordering them to pay restitution in the amount of \$575.00 without sufficient evidence to support the award. It is well established that “[t]he amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing.” *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777 (2010). On appeal, this Court reviews *de novo* whether the restitution ordered by the trial court is supported by competent evidence. *State v. McNeil*, 209 N.C. App. 654, 667, 707 S.E.2d 674, 684 (2011).

The State concedes error on this issue, acknowledging that there was no evidence presented regarding the monetary value of the property damage caused by Defendants. Restitution “is not intended to punish defendants but to compensate victims,” and the amount ordered must be based on “something more than a guess or conjecture.” *State v. Daye*, 78 N.C. App. 753, 758, 338 S.E.2d 557, 561, *aff’d per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986). Accordingly, we vacate the trial court’s restitution orders and remand for a rehearing on this issue. *See Mauer*, 202 N.C. App. at 552, 688 S.E.2d at 778 (vacating restitution order and remanding for rehearing where no evidence was introduced at trial or sentencing to support amount of restitution ordered).

IV. Ineffective Assistance of Counsel

[6] Finally, Defendants claim that their defense counsel’s failure to request a jury instruction defining larceny and an instruction on first-degree trespass constitutes ineffective assistance of counsel. We disagree.

“A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge.” *State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003). Here, we have already determined that the trial court did not commit

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plain error in its instructions to the jury because (1) the trial court was not required to expressly define larceny under the facts of this case; and (2) Defendants were not entitled to an instruction regarding first-degree trespass. Accordingly, we cannot conclude that their trial counsel's failure to request these instructions constituted ineffective assistance of counsel. *See State v. Land*, ___ N.C. App. ___, ___, 733 S.E.2d 588, 595 (2012) (holding that "[s]ince the trial court did not commit plain error when failing to give the instructions at issue, defendant cannot establish the necessary prejudice required to show ineffective assistance of counsel for failure to request the instructions"), *aff'd per curiam*, 366 N.C. 550, 742 S.E.2d 803 (2013).

Conclusion

For the reasons stated above, we conclude that Defendants' second-degree burglary convictions and the trial court's restitution orders must be vacated. We remand to the trial court for entry of judgment and resentencing as to each Defendant on the charges of felonious breaking or entering and for rehearing on the issue of restitution.²

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges STEELMAN and STEPHENS concur.

2. We also note that the judgments entered by the trial court mistakenly list Defendants' conspiracy offenses as conspiracy to commit breaking or entering of a building rather than conspiracy to commit second-degree burglary. While the judgments reflect the correct class of felony for conspiracy to commit second-degree burglary (Class H), the trial court should amend the offense descriptions upon remand so that the record may "speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted).

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[234 N.C. App. 260 (2014)]

STATE OF NORTH CAROLINA

v.

STEVEN RIGIL McCANLESS

No. COA13-1292

Filed 3 June 2014

1. Evidence—admission of anime images—overwhelming—evidence of guilt—no reasonable possibility of different result

The trial court did not commit prejudicial error in a sexual offenses with a child case by admitting evidence of seven anime images taken from defendant's computer. Even assuming arguendo that the trial court erred in admitting the images, given the overwhelming evidence of defendant's guilt, no reasonable possibility existed that a different result would have been reached at trial absent the admission of the anime images.

2. Parties—joinder—sexual offenses—sufficient evidence—transactional connection

The trial court did not abuse its discretion in a sexual offenses with a child case by joining 3 September 2010 offenses and 1 July 2011 offenses for trial. The evidence was sufficient to constitute a transactional connection between the acts.

3. Confessions and Incriminating Statements—to law enforcement officers—voluntary

The trial court did not err in a sexual offenses with a child case by denying defendant's motion to suppress statements made by him to law enforcement officers. The unchallenged findings of fact were sufficient to conclude that defendant's statements were voluntary.

Appeal by defendant from judgments entered 20 May 2013 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 23 April 2014.

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

Paul Louis Bidwell and Douglas A. Ruley, for defendant.

ELMORE, Judge.

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On 17 May 2013, a jury found Stephen Rigil McCanless (defendant) guilty of attempted sexual offense by an adult with a child and indecent liberties with a child. Judge Mark E. Powell sentenced defendant to consecutive terms of 157-198 months and 13-16 months active imprisonment. Defendant appeals. After careful consideration, we find no prejudicial error.

I. Facts

The State indicted defendant for offenses that allegedly occurred on 3 September 2010 and 1 July 2011. The State alleged that on 3 September 2010, defendant, who was fifty-seven-years-old at the time, “expose[d] his private parts in a public place, the Goodwill Store . . . in the presence of another person, [M.S.],” and committed indecent liberties with her. The State also charged defendant with the sexual offense of a child occurring on 1 July 2011 by “engag[ing] in a sexual act with [K.C.],” first degree kidnapping, and another count of indecent liberties.

Before trial, both parties filed motions with the trial court. The State made a motion to join the September and July offenses for trial pursuant to N.C. Gen. Stat. § 15A-926(a). Defendant filed a motion *in limine* to exclude “almost comic book form” Japanese anime images that depicted sexually suggestive pictures of a young girl. The images were found on a computer that was seized by law enforcement officers from defendant’s home during the criminal investigation. Defendant also filed a motion to suppress statements made by him to officers of the Asheville Police Department on 6 July 2011. Defendant told officers that he was at a Salvation Army Store on 1 July 2011, interacted with a young girl, pulled her pants down, touched her leg and vagina, and “motorboated” (blowing air from a person’s mouth on to the skin of another) the girl in her buttock area. He also divulged facts implicating his involvement with M.S. at the Goodwill Store in September 2010 by stating that he may have “flashed” someone. The trial court granted the State’s motion to join and denied both defendant’s motion *in limine* and motion to suppress.

II. Analysis**a.) Admission of Images**

[1] Defendant first argues that the trial court committed prejudicial error by admitting evidence of seven anime images taken from defendant’s computer. We disagree.

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Pursuant to N.C. Gen. Stat. § 15A-1443 (2013):

[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

Thus, our standard of review is “whether a reasonable possibility exists that the evidence, if excluded, would have altered the result of the trial.” *State v. Anderson*, 177 N.C. App. 54, 62, 627 S.E.2d 501, 505 (2006). Important to our analysis is our Supreme Court’s holding that “the presence of [other] overwhelming evidence of guilt” can render the erroneous admission of evidence harmless. *State v. Austry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citation omitted).

We need not answer the question of whether the trial court erred in admitting this evidence in order to dispose of this issue on appeal. Even assuming *arguendo* that the trial court erred in admitting the images, we conclude that the error was not prejudicial as to defendant’s convictions of attempted sexual offense and indecent liberties with a child against K.C. on 1 July 2011.

At trial, the State offered evidence that on 1 July 2011, seven-year-old K.C., K.C.’s mother, and K.C.’s adult sister arrived at the Salvation Army Store. K.C. testified that she walked into the furniture room alone, sat down in a lawn chair, defendant approached her, and he used his finger to touch the inside of her “pee-pee” or “front part[,]” which were words used to describe her vagina. Thereafter, defendant took K.C. behind a grill, and she stated that defendant pulled her pants and underwear down, “put his tongue on my butt and started licking the inside of my butt.” K.C.’s version of events remained consistent when she subsequently told her mother, Detective John Rikard, Nurse Alicia Eifler and Dr. Cindy Brown. Cassie York, a customer at the store, testified that she observed defendant with one knee on the ground as he stood next to K.C. Another customer, Wenona Rogers, testified that she saw K.C. with her pants partially down as defendant had his tongue on K.C.’s butt while “fondling” her. Two store employees, Gary King and Sharon Brown, heard K.C. say that defendant licked her buttock. Furthermore, K.C.’s adult sister testified that she went to locate K.C. and saw defendant “kneeling” in front of K.C. and pulling her pants up.

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After K.C.'s sister confronted defendant to ask him what he was doing, he ran out of the store and drove away in a truck. During his interview with police, defendant admitted to patting K.C. on the leg, pulling her pants down, touching her buttock and vagina, and said that "I'm not looking for sex from a child. . . . I'm pretty sure I'm not, but I -- I'd like to find out for sure." This overwhelming evidence of defendant's guilt presented by the State defeats defendant's contention that a reasonable possibility exists that a different result would have been reached at trial had the trial court barred admission of the anime images from the jury. Accordingly, any error, if any, was not prejudicial to defendant.

b.) Joinder of Offenses

[2] Defendant also argues that the trial court erred in joining the 3 September 2010 offenses and the 1 July 2011 offenses for trial because "[t]here [w]as [i]nsufficient [t]ransactional [c]onnection [b]etween [t]hese [o]ffenses." We disagree.

"[T]he trial judge's decision to consolidate for trial cases having a transactional connection is within the discretion of the trial court and, absent a showing of abuse of discretion, will not be disturbed on appeal." *State v. Williams*, 355 N.C. 501, 529-30, 565 S.E.2d 609, 626 (2002) (citation and quotation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision."). "[T]he test on review is are the offenses so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Peterson*, 205 N.C. App. 668, 672, 695 S.E.2d 835, 839 (2010) (citation and quotation omitted).

Under N.C. Gen. Stat. § 15A-926 (2013), "[t]wo or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." In ruling on a motion to join, the trial court "must first determine if the statutory requirement of a transactional connection is met." *Williams* at 529, 565 S.E.2d at 626 (citation omitted). The presence or absence of a transactional connection "is a

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fully reviewable question of law.” *Id.* (citation omitted). The trial court “should consider (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case.” *Peterson* at 672, 695 S.E.2d at 839 (citation and quotation omitted). Joinder “is made prior to trial; the nature of the decision and its timing indicate that the correctness of the joinder must be determined as of the time of the trial court’s decision and not with the benefit of hindsight.” *State v. Silva*, 304 N.C. 122, 127, 282 S.E.2d 449, 453 (1981).

We first note that although the trial court dismissed the charge of indecent liberties with a child against M.S. at the close of the State’s evidence and the jury found defendant not guilty of felony indecent exposure against M.S., those facts are irrelevant in analyzing whether the trial court abused its discretion at the time it entered the order for joinder of the offenses. *See id.* at 127, 282 S.E.2d at 452 (“Although the conspiracy charge, the actual link connecting the armed robbery and larceny charges, was dismissed at the close of the evidence, that fact . . . cannot enter into our consideration of whether [the trial judge] abused his discretion in allowing joinder.”).

The evidence in the two cases show resemblances in victim, location, motive, and modus operandi. Just like the circumstances surrounding the acts against K.C. on 1 July 2011 as described above, the alleged acts against M.S. on 3 September 2010 were similar. Four-year-old M.S. and her mother were inside a Goodwill store. M.S. and her mother became separated by a clothing rack, and M.S. testified that a man showed her his “bummy.” By the time M.S. told her mother what happened, the alleged perpetrator had already left the store. In sum, the State’s theory alleged that in each case defendant’s victim was a prepubescent young girl, the acts occurred within months of one another in a donation store while the girl was momentarily alone, defendant immediately fled the store after committing the act, and defendant exerted acts of sexual misconduct. This evidence was sufficient to constitute a transactional connection between the acts such that joinder of the offenses was not an abuse of discretion.

c.) Motion to Suppress

[3] In his last argument on appeal, defendant contends that the trial court erred in denying his motion to suppress statements made by him to law enforcement officers because they were not voluntary. Again, we disagree.

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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). If a finding of fact is not challenged on appeal, it is "presumed to be supported by competent evidence and is binding on appeal." *State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006) (citation and quotation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The voluntary nature of a statement is determined by the "totality of the circumstances[.]" *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992) (citation omitted). We consider the following factors, none of which is determinative: "the defendant's mental capacity; whether the defendant was in custody at the time the confession was made; and the presence of psychological coercion, physical torture, threats, or promises." *Id.* (citation omitted).

We initially note that defendant does not challenge any of the trial court's findings of fact as being unsupported by competent evidence. Instead, he merely states that the findings only addressed "some of the statements made by the detectives" and were "undermined" by other testimony. However, "the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. McArn*, 159 N.C. App. 209, 211, 582 S.E.2d 371, 373 (2003) (citation and quotation omitted). Thus, in the case *sub judice*, the trial court's findings of fact are binding on appeal, and our sole task is to determine whether these findings support the trial court's legal conclusion that defendant's statements to law enforcement officers were voluntary.

While defendant argues that "[t]he detectives' lies, deceptions, and implantation of fear and hope established a coercive atmosphere[.]" the trial court's findings indicate the contrary:

23. Information was given to the Defendant regarding several topics including the Child Medical Examination (CME) performed on the minor child following the incident of July 1, 2011 and the Sexual Assault Kit involving saliva residue and DNA upon the minor child. Rikard wanted the Defendant to believe that DNA testing implicated the Defendant however the detective never lied

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to the Defendant by stating that the officer had received DNA testing implicating the Defendant with the minor child. Officer Rikard informed the Defendant that the CME was performed on the minor child but did not tell the Defendant that the test results of the CME had not been received by the officers[.]

...

24. Officer Loveland informed the Defendant that there was a video of the incident, without indicating exactly what information the video revealed[.]

...

29. Detective Rikard followed standard interrogation procedure with the Defendant which included sharing some information with the Defendant to elicit a response and withholding other information thereby allowing the Defendant to speak if he wished to do so on the topic being discussed.

30. The profanity used by Rikard was not continuous, ongoing or in a manner which was used to intimidate the Defendant over an extended period of time. The profanity used by Rikard did not appear to have a significant effect upon the Defendant and his statements to the officers.

...

35. The officers did not tell the Defendant the entire contents of the Goodwill Store video nor were they obligated to do so.

Moreover, the trial court found that:

Defendant arriv[ed] at the police department on his own volition, [was] under no compulsion to remain in the interview room, [was] not being restrained in any manner, was not intimidated by a show of force of the officers, display of any type of weapons, promise of reward, leniency or any other inducement. In addition the interview room was open, the Defendant was left alone, departed the police department alone when the interview was completed, and was offered amenities such as drinking water and bathroom facilities. The interview was not excessively

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long in duration and there is no indication the Defendant was incommunicado from friends or family. . . . There is no evidence that the Defendant was under any physical or mental impairment nor was he under the influence of controlled substances, medications, or alcohol during this interview[.]

These findings are sufficient to conclude that defendant's statements were voluntary. *See State v. Barden*, 356 N.C. 316, 339, 572 S.E.2d 108, 125 (2002) (holding that defendant's statements to police were voluntary where defendant was offered cigarettes and refreshments, had the freedom to use the rest room without being accompanied by an officer, was never restrained or handcuffed during questioning, did not remain in the interview for a prolonged period of time, and did not receive threats or pressure to give a statement). Thus, the trial court did not err in denying defendant's motion to suppress and admitting his statements at trial.

III. Conclusion

In sum, we expressly decline to address whether or not the trial court actually erred by denying defendant's motion *in limine* to preclude the State from presenting jurors with the anime images found on defendant's computer. Even assuming *arguendo* that the trial court erred, the images did not prejudice defendant due to other overwhelming evidence of his guilt. Furthermore, the trial court did not err in joining the September and July offenses for trial because a transactional connection was present between the acts. Finally, the trial court's denial of defendant's motion to suppress and subsequent admission of defendant's statements was free of error as his statements were voluntary.

No prejudicial error.

Judges McCULLOUGH and DAVIS concur.

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STATE OF NORTH CAROLINA

v.

PIERCE McCOY, DEFENDANT

No. COA13-933

Filed 3 June 2014

1. Evidence—authentication—handwriting—self-authenticating affidavit—comparison to buy ticket

The trial court did not commit error or plain error in a possession of a firearm by a felon case by allowing the signature on defendant's affidavit of indigency to be compared to the signature on the buy ticket for a firearm sold to a pawn shop. Defendant's affidavit was a self-authenticating document pursuant to N.C.G.S. § 8C-1, Rule 902, and there was enough similarity between the signature on the affidavit and the signature on the buy ticket that the jury could reasonably infer that the signature on the buy ticket was genuine.

2. Firearms and Other Weapons—possession of by felon—sufficient evidence of possession

The trial court did not err in a possession of a firearm by a felon case by denying defendant's motion to dismiss. The State presented sufficient evidence from which the jury could conclude that defendant actively possessed the gun which was sold to the pawn shop.

3. Firearms and Other Weapons—possession of by felon—jury instructions—prior conviction—not plain error

Although the trial court erroneously instructed the jury in a possession of a firearm by a felon case that defendant had previously been convicted of the same crime, in light of the evidence of defendant's guilt, the trial court's statement did not have a probable impact on the jury's finding that the defendant was guilty.

Appeal by defendant from judgment entered on or about 19 February 2013 by Judge R. Allen Baddour in Superior Court, Durham County. Heard in the Court of Appeals 23 January 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Melody Hairston, for the State.

Anne Bleyman, for defendant-appellant.

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STROUD, Judge.

Defendant appeals judgment convicting him of possession of firearm by felon. For the following reasons, we find no error.

I. Background

Defendant was charged with possession of a firearm by a felon based upon an investigation conducted by Officer Charles Britt of the fraud unit of the Durham Police Department Investigations Bureau. Officer Britt testified that he “download[s] pawn [shop] files every morning and check[s] for stolen property[.]” “[A]t the end of every month [Officer Britt] run[s] all firearms that are pawned at the pawn shops in Durham. Then [Officer Britt] check[s] to see if either persons that have sold or pawned firearms are convicted felons.” In 2011, Officer Britt picked up a buy transaction (“buy ticket”)¹ for a firearm which listed defendant’s name and date of birth. Defendant had previously been convicted of a felony. At defendant’s trial the State admitted exhibits, including the buy ticket, a DVD, and an affidavit of indigency (“affidavit”). A jury found defendant guilty of possession of a firearm by a felon, and the trial court entered judgment upon the conviction. Defendant appeals.

II. Defendant’s Signature

[1] Defendant first contends that “the trial court committed error or plain error in allowing the signature on the affidavit to be compared to the signature on the buy ticket where the signatures on the documents were not sufficiently authenticated nor ruled to be sufficiently similar to each other in violation of . . . [defendant’s] rights.” (Original in all caps.) Defendant’s arguments are based upon the comparison of his signature on the buy ticket and his affidavit; defendant claims that each signature required authentication by either an expert in handwriting analysis or by a witness who was familiar with his handwriting based upon knowledge gained outside of this case in order for the jury to be able to compare them. Defendant is correct that no witness testified who could identify the signatures as an expert or based upon familiarity with defendant’s

1. The “buy transaction” is actually a piece of paper signed by the individual selling property to the pawn shop. It is documentary evidence that the individual is selling property to the pawn shop. The director of operations of the pawn shop testified that “[a] buy transaction and a pawn transaction are two different things. . . . A pawn is when you’re actually leaving your merchandise in exchange for money for an extended period of time; 30 days. A buy transaction, you’re literally relinquishing your rights to the merchandise immediately[.]”

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signature outside of the case, but we disagree with defendant that such testimony was necessary.

A. Affidavit of Indigency

The State's last witness was "a Deputy Clerk with the Durham County Superior Criminal Division." Through the Deputy Clerk the State admitted "a certified, true copy" of the affidavit which was signed by defendant and had his date of birth on it. The affidavit was "SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE" a Deputy Clerk of Superior Clerk who also signed the document, which is a self-authenticating document pursuant to North Carolina General Statute § 8C-1, Rule 902, and thus the affidavit did not need to be authenticated pursuant to Rule 901. *See* N.C. Gen. Stat. § 8C-1, Rules 901 and 902 (2011). As such, the trial court did not err in admitting the affidavit without consideration of North Carolina General Statute § 8C-1, Rule 901.

B. Comparison of Defendant's Signature

In determining the authenticity of a document, it is a well-settled evidentiary principle that a jury may compare a known sample of a person's handwriting with the handwriting on a contested document without the aid of either expert or lay testimony. However, before handwritings may be submitted to a jury for its comparison, the trial court must satisfy itself that there is enough similarity between the genuine handwriting and the disputed handwriting, such that the jury could reasonably infer that the disputed handwriting is also genuine.

State v. Owen, 130 N.C. App. 505, 509, 503 S.E.2d 426, 429 (1998) (citations and quotation marks omitted) (citing *State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982)), *disc. review denied and appeal dismissed*, 349 N.C. 372, 525 S.E.2d 187-88 (1998).

In *State v. LeDuc*, the case cited in *Owen*, *id.*, the Supreme Court noted that the "preliminary determinations[.]" both of whether one of the handwritings was genuine and whether the genuine and disputed handwritings were similar, were to be made by the trial court. 306 N.C. 62, 74, 291 S.E.2d 607, 614 (1982), *overruled on other grounds*, *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). Yet the Court also stated that "[b]oth of these preliminary determinations by the trial judge are questions of law fully reviewable on appeal." *Id.* Thus in *LeDuc*, this Court itself made "these preliminary determinations[.]" *Id.* ("In the instant case, the samples shown to the jury for comparison with the

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disputed charter were given by the defendant himself. Having examined these samples with the disputed signature on the charter, we are satisfied that there is enough similarity between them for the documents to have been submitted to the jury for its comparison.”) In *Owen*, this Court noted that both the trial court and this Court itself had compared the genuine and disputed handwritings. *See Owen*, 130 N.C. App. at 509, 503 S.E.2d at 429-30.

Thus, we must review the evidence to determine if there was “enough similarity between them for the documents to have been submitted to the jury for its comparison.” *LeDuc*, 306 N.C. at 74, 291 S.E.2d at 614. The “known sample” of the signature, found on defendant’s self-authenticating affidavit, *see* N.C. Gen. Stat. § 8C-1, Rule 902, shows the signature of “Pierce E. McKoy[.]”² Notable about the signature on the affidavit is the inclusion of the middle initial followed by a period and that the “c” in “McKoy” is underscored with a zigzag line. On the buy ticket which has the disputed signature, the signature is also by “Pierce E. McKoy[,]” including the middle initial followed by a period, and the “c” in “McKoy” underscored by a zigzag line. In fact, all of the letters are formed in essentially the same way and the signatures are nearly identical. We are “satisfied that there is enough similarity between the genuine handwriting and the disputed handwriting, that the jury could reasonably infer that the disputed handwriting is also genuine[.]” *LeDuc*, 306 N.C. at 74, 291 S.E.2d at 614. Thus, the buy ticket with the disputed signature was properly admitted, and the jury was free to compare the signature on it with the signature on the self-authenticating affidavit. *See id.* Accordingly, this argument is overruled.

III. Motion to Dismiss

[2] Defendant next contends that the trial court erred in denying his motion to dismiss. Defendant argues that the State failed to present sufficient evidence that he either actually or constructively possessed the gun which was sold to the pawn shop.

The standard of review for a motion to dismiss is well known. A defendant’s motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant’s being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might

2. We note that the judgment and documents in the record spell defendant’s name McCoy with a “c” rather than a “k” as in McKoy.

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accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Teague, 216 N.C. App. 100, 105, 715 S.E.2d 919, 923 (2011) (citation omitted), *disc. rev. denied and appeal dismissed*, 365 N.C. 547, 720 S.E.2d 684 (2012).

There are two elements to possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm. It is uncontested that defendant had been convicted of a felony prior to the date in question. Therefore, the only element we must consider is possession.

Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

State v. Mitchell, ___ N.C. App. ___, ___, 735 S.E.2d 438, 442-43 (2012) (citations and quotation marks omitted).

Here, as in *Mitchell*, defendant does not contest that he has previously been convicted of a felony, so possession is the only element at issue on appeal. *See id.* at ___, 735 S.E.2d at 443. Taken in a light most favorable to the State, *see Teague*, 216 N.C. App. at 105, 715 S.E.2d at 923, the State presented a DVD showing a man consistent with defendant's appearance placing a gun on the pawn shop counter. The State's evidence also included a buy ticket with both defendant's name and date of birth on it along with defendant's affidavit uncontestedly signed by defendant. A director of operations for the pawn shop explained that the individual signing the buy ticket at issue here is "literally relinquishing [his] rights to the merchandise immediately[,]" in this case the gun. As discussed above, the jury could find based upon comparison of the signatures on the affidavit and the buy ticket that the same person signed both of them, meaning that the person who placed the gun on the counter of the pawn shop, sold the gun to the pawn shop, and filled out the buy ticket, was the defendant. This evidence would permit the jury to

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find that the defendant actually possessed the gun when he brought it to the pawn shop to sell it. This was substantial evidence upon which to deny defendant's motion to dismiss, *see Mitchell*, ___ N.C. App. at ___, 735 S.E.2d at 443; *Teague*, 216 N.C. App. at 105, 715 S.E.2d at 923, and therefore overrule this argument.

IV. Jury Instructions

[3] Before defendant's trial he stipulated in writing as to his prior felony conviction. When the trial court was instructing the jury it stated,

[O]n February 10th, 2000, in Durham County Superior Court, the defendant pled guilty to the felony of possession of a firearm by a felon that was committed on July 2nd, 1999, in violation of the laws of the State of North Carolina. The defendant and the State have stipulated to this prior conviction. So, for purposes of . . . this trial you are to find this element to be proved beyond a reasonable doubt." Defendant contends it was error for the trial court to instruct the jury in this manner, and the State agrees.

Defendant failed to object at trial, but now contends it was plain error for the trial court to inform the jury he had previously been convicted of the crime possession of a firearm by a felon. In light of the evidence as noted above, we are not convinced that the trial court's statement that defendant had previously been convicted of the same crime "had a probable impact on the jury's finding that the defendant was guilty." *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, we overrule this argument.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges HUNTER, JR., Robert N. and DILLON concur.

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[234 N.C. App. 274 (2014)]

STATE OF NORTH CAROLINA

v.

OMAR ANDRE McFARLAND, DEFENDANT

No. COA13-1234

Filed 3 June 2014

1. Constitutional Law—due process—homeless person—sex offender—failure to report change of address—statute not void for vagueness

The trial court did not err by denying defendant's motion to dismiss a charge under N.C.G.S. § 14-208.11 for failing to report a change of address as a sex offender even though defendant contended that the statute was so vague that it violated due process. The fact that it may sometimes be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses.

2. Sexual Offenders—failure to report change of address—homeless person—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge under N.C.G.S. § 14-208.11 for failing to report a change of address as a sex offender. The State presented sufficient evidence, taken in the light most favorable to the State, that defendant was residing at some address different from the one last registered without notifying the local sheriff of a change in address.

3. Sexual Offenders—failure to report change of address—insufficient conclusions of law

Although the trial court's failure to make adequate conclusions to support its decision to deny defendant's motion to suppress did not require a new trial in a failing to report a change of address as a sex offender case, the case was remanded for the trial court to make appropriate conclusions of law based upon the findings of fact with regard to defendant's motion to suppress.

Appeal by defendant from Judgment entered on or about 28 June 2013 by Judge Susan E. Bray in Superior Court, Forsyth County. Heard in the Court of Appeals 6 March 2014.

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

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[234 N.C. App. 274 (2014)]

James N. Freeman, Jr., for defendant-appellant.

STROUD, Judge.

Omar McFarland (“defendant”) appeals from the judgment entered after a Forsyth County jury found him guilty of failing to report a change of address as a sex offender. We find no error at trial, but remand for the trial court to make conclusions of law with regard to defendant’s motion to suppress as required by statute.

I. Background

Defendant was indicted in Forsyth County for failing to report a change of address as required by the sex offender registration statutes and for having attained habitual felon status. Defendant pled not guilty and proceeded to jury trial on 26 June 2013. Before trial, defendant filed a written motion to suppress statements he made to the police, which he contended were obtained in violation of his constitutional rights. The trial court denied the motion from the bench without explanation or oral findings of fact. The trial court then entered a written order with findings of fact on 24 June 2013.

At trial, the State’s evidence tended to show that defendant was a convicted sex offender. Prior to being released from prison, defendant was given a notice of the rules applicable to sex offenders upon release, including the statutory requirement that he notify the sheriff’s office of a change of address. Defendant signed the notice and indicated that he intended to reside at the Samaritan Ministries homeless shelter. He was released from prison on 9 October 2012. On 10 October 2012, defendant went to the Forsyth County Sheriff’s Office to register as a sex offender. When he registered, defendant was given a more extensive notice of the rules that apply to sex offenders, which he signed. He initialed by each rule. One of the rules listed concerned changes of address. It explained that

[w]hen an offender that is required to register changes addresses, they must appear in person and provide written notification of this address change to the Sheriff in the county where they have most currently registered. This in-person notification must be made to the county Sheriffs within 3 business days of the address change. The offender must also register with the new Sheriff. I shall report the address or a detailed description of every location I reside or live at. I understand I must report a location even if it does not have a street address.

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Defendant initialed this notice, indicating that he had read and understood it.

On 26 October 2012, Deputy R.C. Holland of the Forsyth County Sheriff's Office went to the Samaritan Ministries shelter to verify defendant's address. The shelter's records indicated that defendant had stayed there previously, but not since 2008. Deputy Holland reported his findings to Detective Gargiulo of the Sex Offender Registry Unit. Detective Gargiulo waited three days to allow defendant the opportunity to appear and change his address. On 30 October 2012, Detective Gargiulo secured a warrant for defendant's arrest.

The detective attempted to get in touch with defendant, unsuccessfully at first. Detective Gargiulo was able to speak with defendant on the phone on 7 November 2012 and asked him to come to the Sheriff's Office. Defendant came into the office that same day. He was escorted to an unsecured interview room and was not handcuffed. He was not informed that a warrant for arrest had been issued. Detective Gargiulo and Corporal Sales then spoke with defendant about where he had been living. Defendant objected at trial to the admission of his statements, renewing the same objections raised by his motion to suppress. The trial court again overruled the objections.

Defendant at first said that he was staying at the Samaritan Ministries shelter. When confronted with evidence that he had not been staying there, in violation of the sex offender registration statutes, he explained that he was staying with various people and moving from place to place. Defendant asked how he could have an address when he was homeless. Detective Gargiulo explained that he had to notify the Sheriff's Office every time he changed residences. At the end of the interview, defendant was placed under arrest and served with the arrest warrant.

At the close of the State's evidence, defendant moved to dismiss the charges on the basis that N.C. Gen. Stat. § 14-208.11 (2011) was void for vagueness as applied to him and on the ground that the State had failed to present sufficient evidence. The trial court denied defendant's motion. The jury found defendant guilty of violating N.C. Gen. Stat. § 14-208.11. Defendant then pled guilty to having attained habitual felon status, explicitly reserving his right to appeal the underlying conviction. The trial court found three mitigating factors and no aggravating factors. The trial court sentenced defendant to a mitigated range term of 58-82 months imprisonment. Defendant gave notice of appeal in open court.

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II. Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss. First, he contends that N.C. Gen. Stat. § 14-208.11 (2011) is void for vagueness. Second, he argues that even if the statute is constitutional, the State failed to present sufficient evidence. We disagree.

A. Standard of Review

We review the denial of a motion to dismiss premised on the alleged unconstitutionality of the criminal statute and the insufficiency of the evidence *de novo*. *State v. Buddington*, 210 N.C. App. 252, 254, 707 S.E.2d 655, 656 (2011); *State v. Fisher*, ___ N.C. App. ___, ___, 745 S.E.2d 894, 901, *disc. rev. denied*, ___ N.C. ___, 752 S.E.2d 470 (2013). “In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *State v. Highsmith*, 173 N.C. App. 600, 605, 619 S.E.2d 586, 590 (2005) (citation and quotation marks omitted).

B. Void for Vagueness

Defendant argues that the trial court erred in denying his motion to dismiss because N.C. Gen. Stat. § 14-208.11 (2011) is void for vagueness as applied to him. He contends that because he is homeless, a person of ordinary intelligence person could not know what “address” means in his case. We hold that the statute is not so vague that it violates due process.

Defendant moved to dismiss the charge against him on the basis that the statute is void for vagueness. Therefore, he has properly preserved this constitutional challenge. *Cf. State v. Fox*, 216 N.C. App. 153, 158-59, 716 S.E.2d 261, 266 (2011) (declining to consider the defendant’s argument that the sex offender registration statute was void for vagueness where he failed to raise the constitutional issue at trial).

Defendant was indicted for violating N.C. Gen. Stat. § 14-208.11(a) (2), which establishes that a person required to register under the sex offender registration statute commits a Class F felony if he “[f]ails to notify the last registering sheriff of a change of address as required by this Article.” N.C. Gen. Stat. § 14-208.9(a) (2011) states, in relevant part, that “[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county

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with whom the person had last registered.” The statute does not define the term “address.” Defendant contends that the absence of a definition makes the change-of-address requirement void for vagueness as applied to him because he was homeless, so he had no “address.”

“To satisfy due process, a penal statute must define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement. The void-for-vagueness doctrine embraces these requirements.” *Skilling v. United States*, 561 U.S. 358, 402, 177 L.Ed. 2d 619, 656 (2010) (citation, quotation marks, and brackets omitted). The North Carolina Supreme Court has “expressed an almost identical standard.” *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L.Ed. 2d 783 (1999). Our Supreme Court has explained that “[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) (citations and quotation marks omitted), *aff’d*, 403 U.S. 528, 29 L.Ed. 2d 647 (1971).

“Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.” *Id.* “What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *United States v. Williams*, 553 U.S. 285, 306, 170 L.Ed. 2d 650, 670 (2008). Moreover, “clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, [though] due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” *United States v. Lanier*, 520 U.S. 259, 266, 137 L.Ed. 2d 432, 442-43 (1997) (citations omitted). “[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *Id.* at 267, 137 L.Ed. 2d at 443.

Our Supreme Court clearly and unambiguously defined the term “address” as used in N.C. Gen. Stat. § 14-208.11 well before defendant was released from prison in October 2012. The Supreme Court explained that

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[r]esidence simply indicates a person's actual place of abode, whether permanent or temporary. Thus, a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. Notably, a person's residence is distinguishable from a person's domicile. . . . Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address.

State v. Abshire, 363 N.C. 322, 331-32, 677 S.E.2d 444, 450-51 (2009) (citations and quotation marks omitted).

Further, this Court has applied the Supreme Court's definition of "address" in a case where, as here, the defendant was homeless. In *State v. Worley*, we held that "everyone does, at all times, have an 'address' of some sort, even if it is a homeless shelter, a location under a bridge or some similar place." *State v. Worley*, 198 N.C. App. 329, 338, 679 S.E.2d 857, 864 (2009). We noted that "[t]he purpose of the sex offender registration program is to assist law enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary." *Id.* at 334-35, 679 S.E.2d at 862 (citation and quotation marks omitted). As a result, we rejected the defendant's argument that homeless sex offenders have no address for purposes of the registration statutes, reasoning that a contrary holding would render "such individuals . . . effectively immune from the registration requirements found in current law as long as they continued to 'drift.'" *Id.* at 338, 679 S.E.2d at 864.

Even assuming that the language of the statute is ambiguous, defendant had full notice of what was required of him, given the judicial gloss that the appellate courts have put on it. *See Lanier*, 520 U.S. at 267, 137 L.Ed. 2d at 443. Certainly after *Abshire* and *Worley*, if not before, a person of reasonable intelligence would understand that a sex offender is required to inform the local sheriff's office of the physical location where he resides within three business days of a change, even if that location changes from one bridge to another, or one couch to another. *Worley*, 198 N.C. App. at 338, 679 S.E.2d at 864. Although this obligation undoubtedly places a large burden on homeless sex offenders, it is clear that they bear such a burden under N.C. Gen. Stat. § 14-208.9 and that under N.C. Gen. Stat. § 14-208.11(a)(2) they may be punished for willfully failing to meet the obligation. Moreover, the fact that it may sometimes

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be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses. *See Williams*, 553 U.S. at 306, 170 L.Ed. 2d at 670.

Here, the notice actually given to defendant by the local sheriff's office when he registered, and signed by defendant, reflected this obligation. The statement initialed by defendant stated, "I shall report the address or a detailed description of every location I reside or live at. I understand I must report a location even if it does not have a street address."

We hold that N.C. Gen. Stat. § 14-208.11 is not void for vagueness as applied to defendant because a person of ordinary intelligence in defendant's circumstances would understand what was required of him. *See Burrus*, 275 N.C. at 531, 169 S.E.2d at 888. Therefore, the trial court did not err in denying defendant's motion to dismiss on this basis.

C. Sufficiency of the Evidence

[2] Defendant next argues that even if the statute is not void for vagueness the State failed to present sufficient evidence that he changed addresses. He acknowledges that the State presented evidence that he was not residing at his registered address, the Samaritan's Ministries homeless shelter, but reasons that the State never presented any evidence of where he was actually residing because he was moving from place to place and had no permanent "address." But that is not what the State is required to prove.

[T]he offense of failing to notify the appropriate sheriff of a sex offender's change of address contains three essential elements: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant willfully fails to notify the last registering sheriff of the change of address, not later than the third day after the change.

State v. Fox, 216 N.C. App. 153, 156-57, 716 S.E.2d 261, 264-65 (2011) (citations, quotation marks, ellipses, and brackets omitted). Defendant does not contest that he was required to register and that he never notified the last registering sheriff of a new address. He simply contends that because he had no new address, the State cannot show that it changed.

The State is not required to show what defendant's new address was. The State is simply required to show that defendant changed his address. Defendant's argument is similar to the one we rejected in

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Worley, that a homeless defendant has no residence and therefore no “address.” See *Worley*, 198 N.C. App. at 338, 679 S.E.2d at 864. The State can show that defendant changed his address simply by showing that he was no longer residing at the last registered address because “everyone does, at all times, have an ‘address’ of some sort.” *Id.*

Here, the evidence showed that defendant registered his address as the Samaritan Ministries, but that defendant had not been living there for at least the two weeks prior to 26 October 2012. Defendant registered his address on 10 October 2012 as Samaritan Ministries. When Deputy Holland went to verify defendant’s address he discovered that Samaritan Ministries had no record of defendant having stayed there for over two years. Two employees from Samaritan Ministries testified that they had no record of defendant staying with them in October 2012. They further testified that everyone who stayed with them had to be signed in. The registration card maintained by the shelter showed that defendant’s card had not been stamped since 2008. Thus, there was substantial evidence showing that defendant conducted none of the “activities of life” consistent with residency at the homeless shelter after being released from prison. *Abshire*, 363 N.C. at 332, 677 S.E.2d at 451.

As explained in *Worley*, everyone, at all times, has some address for purposes of the sex offender registration statutes, even if it changes daily. *Worley*, 198 N.C. App. at 338, 679 S.E.2d at 864. Thus, proof that defendant was not living at his registered address is proof that his address had changed. See *id.* at 337, 679 S.E.2d at 863 (“At an absolute minimum, the record contains evidence tending to show that Defendant left Lee Walker Heights on or before 10 August 2005 and failed to report a new address until 16 September 2005.”).

We conclude that the State presented sufficient evidence, taken in the light most favorable to the State, that defendant was residing at some address different from the one last registered without notifying the local sheriff of a change in address. Therefore, we hold that there was sufficient evidence that defendant violated N.C. Gen. Stat. § 14-208.11(a) (2) and that the trial court did not err in denying defendant’s motion to dismiss.

III. Motion to Suppress

[3] Defendant argues that the trial court erred in denying his motion to suppress his videotaped statement to the police because the officers failed to properly give the *Miranda* warnings. We remand so that the trial court may make adequate conclusions of law, as required by statute.

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Defendant moved to suppress his statements under the Fifth and Sixth Amendments to the United States Constitution and Article 1, sections 19, 23, and 24 of the North Carolina Constitution. The trial court heard the motion before trial on 24 June 2013. It denied the motion orally in court and entered an order with written findings on 24 June 2013. Defendant objected to Detective Gargiulo's testimony regarding what he said during the interview and to the admission of the DVD of the interview. Therefore, his challenges to the admission of these statements have been fully preserved.

The trial court made the following findings, none of which are contested by defendant:

1. Defendant Omar Andre McFarland is a convicted sex offender required to comply with North Carolina's sex offender registry.
2. On October 20, 2012, Detective Paolo Gargiulo of the Forsyth County Sheriff's Office obtained a warrant for Defendant McFarland's arrest for failing to comply with the sex offender registry change of address requirements.
3. Forsyth County Deputy Ron Lewis tried unsuccessfully to serve the warrant on Defendant McFarland on November 7, 2012, but he did inform friends and family members of the Defendant that the Defendant should contact the Sheriff's Office. Deputy Lewis did not tell any of the friends or family that there was a warrant out for the Defendant.
4. Later that afternoon on November 7, 2012, Defendant McFarland called the Sheriff's Office, spoke with Detective Gargiulo and arranged a meeting for the next morning (November 8) at 9am. Detective Gargiulo did not tell Defendant he had a warrant.
5. Defendant McFarland came, on his own, to the sheriff's office November 8, 2012, signed in and was escorted to an unsecured interview room. He was not under arrest, but the interview was recorded by video.
6. Defendant McFarland entered the interview room alone, but was soon joined by Detective Gargiulo and Forsyth County Corporal B. Sales, both of whom were dressed in plain clothes. Neither gave Defendant any *Miranda* warnings.

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7. Corporal Sales closed the interview room door, but it remained unlocked. Detective Gargiulo told Defendant, “the door is open—just getting some privacy.” No officer was guarding the inside or outside of the interview room.

8. At the end of the interview when he was arrested, the Defendant was frisked and placed in handcuffs. Prior to then, he was unrestrained.

The trial court then cited a variety of legal standards from applicable case law, but never made a conclusion about whether defendant was in custody at the relevant time, nor did it ever apply the law it cited to the facts of this case. At the hearing, the trial court announced that it was going to deny the motion, but made no oral findings or conclusions.

N.C. Gen. Stat. § 15A-977(f) (2011) provides that when a trial court rules on a motion to suppress, “[t]he judge must set forth in the record his findings of facts and conclusions of law.” We have interpreted this statute as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing. When a trial court’s failure to make findings of fact and conclusions of law is assigned as error, the appropriate standard of review on appeal is as follows: The trial court’s ruling on the motion to suppress is fully reviewable for a determination as to whether the two criteria . . . have been met.

If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court’s denial of the motion to suppress. If a reviewing court concludes that either of the criteria is not met, then a trial court’s failure to make findings of fact, contrary to the mandate of section 15A-977(f), is fatal to the validity of its ruling and constitutes reversible error.

State v. Morgan, ___ N.C. App. ___, ___, 741 S.E.2d 422, 424-25 (2013) (citations, quotation marks, and brackets omitted).

This case is unusual because although the trial court made a number of relevant findings of fact, the trial court did not give any explanation for denying defendant’s motion from the bench and did not include any conclusions of law in its written order. The “conclusions of law” in the written order were simply statements of law such as “4. It is important to consider circumstances such as a ‘police officer standing guard at the

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door, locked doors, or application of handcuffs' in determining whether an individual is in custody. *State v. Buchanan*, 353 N.C. 332 (2001)."

Generally, a conclusion of law requires "the exercise of judgment" in making a determination, "or the application of legal principles" to the facts found. *Sheffer v. Rardin*, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010) (citations and quotation marks omitted). Not one of the "conclusions" here applied the law to the facts of this case. Although we can imagine how the facts as found by the trial court would likely fit into the legal standards recited in the section of the order which is identified as "conclusions of law," based upon the trial court's denial of the motion, it is still the trial court's responsibility to make the conclusions of law. The mandatory language of N.C. Gen. Stat. § 15A-977(f) ("The judge must set forth in the record his findings of facts *and conclusions of law*." (emphasis added)) forces us to conclude that the trial court's failure to make any conclusions of law in the record was error.

"Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial." *State v. Neal*, 210 N.C. App. 645, 656, 709 S.E.2d 463, 470 (2011) (citation and quotation marks omitted).

If the trial court determines that the motion to suppress was properly denied, then defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the court determines that the motion to suppress should have been granted, defendant would be entitled to a new trial.

Id. at 656-57, 709 S.E.2d at 470-71. We have found no other prejudicial error at defendant's trial. Therefore, the trial court's failure to make adequate conclusions to support its decision to deny defendant's motion to suppress does not require that we order a new trial. *See State v. Booker*, 306 N.C. 302, 313, 293 S.E.2d 78, 84-85 (1982). We remand for the trial court to make appropriate conclusions of law with regard to defendant's motion to suppress.

IV. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant's motion to dismiss. Nevertheless, the trial court failed to make adequate conclusions of law to justify its decision to

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deny defendant's motion to suppress his statement. Therefore, we must remand to allow the trial court to make appropriate conclusions of law based upon the findings of fact.

NO ERROR in part; REMANDED.

Judges CALABRIA and DAVIS concurs.

STATE OF NORTH CAROLINA

v.

MICHAEL KEVIN McGEE

No. COA13-1161

Filed 3 June 2014

Motor Vehicles—misdemeanor death by motor vehicle—involuntary manslaughter—bail bondsmen—not authorized to violate motor vehicle laws based on status

The trial court did not err in an involuntary manslaughter and misdemeanor death by motor vehicle case by instructing the jury that bail bondsmen cannot violate North Carolina motor vehicle laws in order to make an arrest. Defendant bail bondsman was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status. The trial court's instruction to the jury did not lessen the State's burden of showing that defendant's violation of North Carolina motor vehicle laws was intentional, willful, wanton, or reckless.

Appeal by defendant from judgment entered 20 February 2013 by Judge Edwin G. Wilson, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 18 February 2014.

Roy Cooper, Attorney General, by Amanda P. Little, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

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The trial court did not err in instructing the jury that bail bondsmen cannot violate North Carolina motor vehicle laws in order to make an arrest. Defendant was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status as a bail bondsman. The trial court's instruction to the jury did not lessen the State's burden of showing that defendant's violation of North Carolina motor vehicle laws was intentional, willful, wanton, or reckless.

I. Factual and Procedural History

On the morning of 31 August 2010, Michael Kevin McGee (defendant), a bail bondsman, called 911 and advised law enforcement that he was pursuing George Mays (Mays), a person who had failed to appear in court. This pursuit was at a high rate of speed in the Salem Church Road area of Goldsboro. Defendant's fiancée, Anecia Neal, was in the front passenger seat of defendant's car. Defendant requested assistance from law enforcement in apprehending Mays. He was traveling at speeds between 80 and 100 miles per hour in his pursuit of Mays. Ivan Carter, another bail bondsman, was also pursuing Mays, in a separate vehicle.

Salem Church Road is a two-lane road with a 45 miles per hour speed limit. Mays passed a vehicle operated by Brenda Cox, in a zone marked with a double yellow line. Defendant also attempted to pass Cox's vehicle, but did so at a curve, and lost control of his vehicle, which went down an embankment.

Ms. Neal was trapped inside the vehicle, with serious injuries. After being transported to Wayne Memorial Hospital, Ms. Neal died of her injuries.

On 7 May 2012, defendant was indicted for one count of involuntary manslaughter and one count of misdemeanor death by motor vehicle. On 20 February 2013, a jury found defendant guilty of involuntary manslaughter. He was sentenced to a term of 13 to 16 months imprisonment. This sentence was suspended and defendant was placed on supervised probation for 36 months. The court imposed a 3 month term of special probation in the Department of Adult Correction as an intermediate sanction.

Defendant appeals.

II. Jury Instruction

In his only argument on appeal, defendant contends that the trial court erred in instructing the jury that in the course of pursuing a

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defendant, a bail bondsman may not violate North Carolina motor vehicle laws. We disagree.

A. Standard of Review

The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). The standard of review set forth by this Court for reviewing jury instructions is as follows:

This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation and quotations omitted).

B. Analysis

In its instructions to the jury, the trial court stated that: “[b]ail bondsmen can make an arrest; however they may not violate the motor vehicle laws of North Carolina to do so.” Defendant objected to this instruction. On appeal, defendant makes three arguments concerning the trial court’s jury instructions: (1) a bail bondsman may violate North Carolina motor vehicle laws when apprehending a principal; (2) whether the reasonableness of the means utilized by a bail bondsman in apprehending a principal is a question of fact for the jury; and (3) whether the trial court lessened the State’s burden of proof by peremptorily instructing the jury that a bail bondsman cannot violate North Carolina motor vehicle laws in the process of arresting a principal.

1. Violation of State Motor Vehicle Laws

North Carolina common law has long recognized that a bail bondsman has sweeping powers to apprehend a principal and may use such force as is reasonably necessary in that process. *State v. Mathis*, 349 N.C. 503, 512, 509 S.E.2d 155, 160 (1998). This right of apprehension, however, is limited and does not give a bail bondsman unlimited powers.

N.C. Gen. Stat. § 20-145 states:

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[S]peed limitations . . . shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies, nor to vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performances of their duties . . .

N.C. Gen. Stat. § 20-145 (2013). The General Assembly created specific exemptions to the motor vehicle laws pertaining to speed for police, fire, and emergency service vehicles. There is no similar statutory provision that exempts a bail bondsman from complying with applicable speed limits when pursuing a principal. Contrary to defendant's argument that a bail bondsman may use reasonable means, including exceeding applicable speed limits, to apprehend a principal, a bail bondsmen is like any other citizen in that he or she must follow the state motor vehicle laws. If the General Assembly had intended to exempt bail bondsmen from complying with applicable speed limits when pursuing a fugitive, it could have easily included such a provision in N.C. Gen. Stat. § 20-145. It is not the role of the courts to create exceptions to the motor vehicle laws enacted by the General Assembly.

In this case, defendant pursued Mays at speeds exceeding the posted speed limits by 30 to 55 miles per hour. We note that defendant's conduct in this case appears to have violated several other motor vehicle safety statutes as well. However, because the trial court submitted the charge of involuntary manslaughter to the jury based solely upon defendant's conduct in operating his vehicle at a speed greater than was reasonable and prudent under conditions then existing, we restrict our analysis to that specific conduct.

Speed restrictions have been enacted "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). While N.C. Gen. Stat. § 20-145 exempts police officers from speed laws when pursuing a violator of the law, even this exemption does not apply to those driving "carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, or without due circumspection and at a speed or in any manner so as to endanger or be likely to endanger any person or property[.]" *Id.* "An intentional, willful, or wanton violation of

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a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence.” *Id.* at 54, 86 S.E.2d at 921. Furthermore, “[c]ulpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.” *Id.*

2. Reasonableness Standard for Bail Bondsman Actions

In *State v. Mathis*, our Supreme Court stated that bail bondsmen may “use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal.” *Mathis*, 349 N.C. at 514, 509 S.E.2d at 162. Defendant relies on this statement of the law to argue that his right to apprehend Mays is only limited by reasonableness and thus, whether the means used in his attempted apprehension of Mays was reasonable is a question of fact for the jury to decide.

The elements of involuntary manslaughter are: “(1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence.” *State v. Davis*, 198 N.C. App. 443, 446, 680 S.E.2d 239, 242 (2009) (quoting *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997)). Culpable negligence is “[a]n intentional, willful, or wanton violation of a statute or ordinance, designed for the protection of human life or limb,” or “such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.” *Norris*, 242 N.C. at 54, 86 S.E.2d at 921.

There are limitations upon the rights of bail bondsmen to use reasonable force in the apprehension of a principal where the rights of third parties are affected. For example, when pursuing a principal into the home of a third party, the bail bondsman may only enter the third party home if the principal also resides there. *Mathis*, 349 N.C. at 513, 509 S.E.2d at 161. Bail bond agreements contain the principal’s consent for the bail bondsmen to “enter the residence of his principal and to seize him.” *Id.* However, the principal cannot contract away the rights of third parties. Just as the bail bondsmen cannot enter the homes of third parties without their consent, a bail bondsmen pursuing a principal upon the highways of this State cannot engage in conduct that endangers the lives or property of third parties. Third parties have a right to expect that others using the public roads, including bail bondsmen, will follow the laws set forth in Chapter 20 of our General Statutes.

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3. Jury Instructions and the State's Burden of Proof

The trial court instructed the jury, concerning the charge of involuntary manslaughter, as follows:

The Defendant has been accused of involuntary manslaughter, which is the unintentional killing of a human being by culpable negligence.

Now I charge that for you to find the Defendant is guilty of involuntary manslaughter, the State must prove three things beyond a reasonable doubt:

First, that the Defendant violated the law of this state governing the operation of motor vehicles by operating a vehicle at a greater speed than is reasonable and prudent under the conditions then existing. *Bail bondsmen can make an arrest; however, they may not violate the motor vehicle laws of North Carolina to do so.*

Second, that the Defendant's violation constituted culpable negligence. The violation of a motor vehicle law which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the law, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the law must be accompanied by reckless of probable consequences of a dangerous nature, when tested by the rule of reasonable foresight, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others.

Third, the State must prove that the Defendant's intentional, willful, wanton or reckless violation of the law proximately caused the victim's death.

(Emphasis added).

The trial court properly instructed the jury that “[b]ail bondsmen can make an arrest; however, they may not violate the motor vehicle laws of North Carolina to do so.” This addition to the North Carolina Pattern Jury Instruction for voluntary manslaughter (NCPJI-Criminal 206.55) did not instruct the jury as to whether the defendant violated any motor vehicle laws. Rather, the instruction clarified that a bail bondsman's right to arrest a principal does not include the right to violate

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motor vehicle laws. The issue that was presented to the jury was whether the defendant violated N.C. Gen. Stat. § 20-141(a), the general statutory speed restrictions, by driving at a greater speed than was reasonable and prudent given the circumstances. The jury had to find that defendant violated this motor vehicle law in order to convict defendant of involuntary manslaughter or misdemeanor death by vehicle. In instructing the jury concerning this essential element of the charged crimes, the trial court did not invade the province of the jury because the jury still maintained the right to decide whether or not defendant violated that law.

Finally, the added jury instruction did not decrease the State's burden of proof relating to that element of the charged crime. The State's burden was not the reasonableness standard advocated by defendant, but rather a culpable negligence standard requiring willful, wanton, or negligent conduct. The additional language simply advised the jury that defendant's status as a bail bondsman did not exempt him from compliance with the motor vehicle laws of this State. This Court has held that it must "consider the instructions in the context of how a reasonable juror might interpret the words." *State v. Flaherty*, 55 N.C. App. 14, 23, 284 S.E.2d 565, 571 (1981) (citations and quotations omitted). A reasonable juror would read the challenged instruction as a clarification of the law at issue, not a directive that defendant violated state motor vehicle laws in his pursuit of Mays. The jury maintained discretion to decide whether defendant violated the applicable statute, whether that conduct rose to the level of intentional, willful, wanton or reckless conduct, and whether this conduct proximately caused the victim's death.

We hold that the trial court's jury instructions were proper. Defendant's arguments are without merit.

IV. Conclusion

The trial court did not err in instructing the jury that bail bondsmen cannot violate North Carolina motor vehicle laws in order to make an arrest.

NO ERROR.

Judges McGEE and ERVIN concur.

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[234 N.C. App. 292 (2014)]

STATE OF NORTH CAROLINA
v.
WINSTON HARVEY STEPHENS, JR.

No. COA14-8

Filed 3 June 2014

1. Indecent Liberties—with student—bill of particulars—instructions

The trial court did not err in a prosecution for indecent liberties with a student by not instructing the jury on the actus reus of each charge according to the amended bills of particulars filed by the State. The victim's testimony included numerous acts, any one of which could have served as the basis for the offenses, and the amended bills of particulars reflected his testimony.

2. Indecent Liberties—with student—definition of enrollment—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a prosecution for indecent liberties with a student where defendant contended that the victim was not enrolled during the summer when the incidents took place. There was evidence from the school principal and the victim's mother that the victim remained enrolled during the summer, even though the academic year was over.

Appeal by defendant from judgments entered 6 May 2013 by Judge V. Bradford Long in Forsyth County Superior Court. Heard in the Court of Appeals 6 May 2014.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

Mark Montgomery for defendant.

HUNTER, Robert C., Judge.

Defendant Winston Harvey Stephens, Jr. appeals the judgments entered after a jury convicted him of three counts of indecent liberties with a student. On appeal, defendant argues that: (1) the trial court erred in not instructing the jury on the specific acts set out in the amended bills of particulars; and (2) the trial court erred in denying defendant's motion to dismiss because the victim was not a "student" at the time of the incidents.

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[234 N.C. App. 292 (2014)]

After careful review, we find no error.

Background

The State's evidence at trial tended to establish the following: In the spring of 2011, J.B.¹ was a sophomore at East Forsyth High School ("East Forsyth"). Defendant was East Forsyth's music teacher. J.B. claimed that he met defendant when he was attending Madrigal workshops, choral training workshops for students at East Forsyth; defendant was the director of the Madrigals. J.B. auditioned for and was accepted into the Madrigals program which would begin in the fall semester. At trial, J.B. claimed that defendant contacted him to see whether J.B. would be interested in helping him during the summer. Specifically, defendant needed a page turner and assistant to help him record music for "Joseph and the Amazing Technicolor Dream Coat," a musical scheduled to be performed at Reynolds High School ("Reynolds") during a special Summer Enrichment Program ("SEP"). After he agreed, J.B. claimed that defendant picked him up every morning and brought him home in the afternoon, around 3:00. This occurred over a two-week period in July 2011; the performance of the musical occurred on three days at the end of July.

At trial, J.B. gave detailed testimony regarding numerous alleged incidents of inappropriate sexual conduct between defendant and J.B. Specifically, J.B. claimed that the first incident occurred in the recording room at Reynolds. J.B. testified that defendant grabbed his arm and kissed it before giving him a full-frontal hug that lasted ten to twenty seconds. J.B. also described two incidents of "cuddling" that happened in the recording room at Reynolds; J.B. stated that he laid on the couch with his back to defendant's stomach while defendant would brush his hair and hold him tightly. J.B. claimed that these incidents lasted anywhere from fifteen minutes to an hour. J.B. also alleged that two other incidents of "cuddling" occurred at J.B.'s apartment—one on the couch in the living room and one on J.B.'s bed.

J.B. testified that incidents of full-frontal hugging happened on a consistent basis during the two-week period at Reynolds. He also alleged that defendant kissed him on his arm, cheek, and neck ten to fifteen times and on his mouth twice. All these incidents allegedly occurred in the recording room, orchestra pit, or on the stage deck at Reynolds. J.B. also claimed that defendant hugged him in the bathroom at Reynolds.

1. To protect the identity of the minor victim, we have used initials.

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J.B. further testified that several incidents occurred in defendant's car on the way to and from the SEP at Reynolds. Specifically, J.B. claimed that he and defendant would hold hands, defendant would brush his hair at stoplights, and defendant would lean over and kiss his neck and cheek daily. J.B. alleged that one final "cuddling" incident occurred on the couch in defendant's office at East Forsyth.

At trial, J.B. also provided a great deal of testimony regarding intimate communications between himself and defendant. Specifically, in one email, defendant referred to J.B. as a "stud muffin" and a "manly man." He also claimed to "love feeling [J.B.'s] soft skin when [their] arms touch[ed]." Furthermore, J.B. described the pet names they had for each other and the gifts they exchanged with each other.

In October, after school had resumed, J.B. told his mother about the incidents. She withdrew him from the Madrigals course but did not report the incidents to the school. Eventually, J.B. spoke with the Kernersville Police Department about the allegations after he was called to the principal's office and questioned.

On 25 June 2012, defendant was indicted for three counts of indecent liberties with a student. On 25 April 2013, the State filed three amended bills of particulars. The State contended that the alleged offenses occurred during the month of July 2011 at J.B.'s residence, at defendant's apartment, in defendant's car, and in the orchestra pit and recording room at Reynolds. As for the acts that constituted the offenses, the State listed numerous acts, including: hugging, kissing, cuddling, and various other types of inappropriate touching by defendant.

At trial, several witnesses testified on behalf of defendant including several students, a teacher, defendant's wife, and defendant himself. In short, the witnesses testified that defendant was a "father figure" to the students and would often hug students in a nonsexual way. In addition, several witnesses testified that defendant would not have had the opportunity to commit any inappropriate acts with J.B. during the SEP. Although defendant admitted that some of his behavior might have been "inappropriate," he denied any misconduct.

On 6 May 2013, the jury found defendant guilty on all three counts. The trial court sentenced defendant to consecutive sentences of six to eight months imprisonment but suspended the sentences for thirty-six months of supervised probation. Defendant appealed.

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[234 N.C. App. 292 (2014)]

Arguments

[1] First, defendant argues that the trial court erred by not instructing the jury according to the amended bills of particulars filed by the State. Specifically, defendant contends that the trial court erred in failing to instruct the jury on the *actus reus* of each charge. We disagree.

“[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

“The function of a bill of particulars is to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry.” *State v. Young*, 312 N.C. 669, 676, 325 S.E.2d 181, 186 (1985). Here, the amended bills of particulars set out numerous acts that constituted the basis for the offenses, including: hugging and kissing at Reynolds; “cuddling” with J.B. at Reynolds; hugging, holding hands, and groping J.B.’s crotch in defendant’s car; hugging and kissing J.B. at J.B.’s home; and “cuddling” with J.B. in his bedroom. At trial, defendant requested the trial court instruct the jury on the *actus reus* for each count. However, the trial court held that it was not required to do so for indecent liberty charges. Defendant contends that the trial court’s failure to instruct as to the acts set out in the amended bills of particulars constituted error.

However, defendant’s argument is without merit. It is well-established that

the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. The evil the legislature sought to prevent in this context was the defendant’s performance of any immoral, improper, or indecent act in the presence of a child for the purpose of arousing or gratifying sexual desire. Defendant’s purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial. It is important to note that the statute does not contain any language requiring a showing of intent to commit an unnatural sexual act. Nor is there any requirement that the State prove that a touching occurred. Rather, the State need only prove the taking of any of the described liberties for the purpose of arousing or gratifying sexual desire.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180-81 (1990) (internal quotation marks omitted).

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Here, the trial court properly instructed the jury that it could find defendant guilty if it concluded that defendant willfully took “any immoral, improper, or indecent liberties” with J.B. The actual act by defendant committed for the purpose of arousing himself or gratifying his sexual desire was “immaterial.” *Id.* Furthermore, J.B.’s testimony included numerous acts, any one of which could have served as the basis for the offenses, and the amended bills of particulars reflected his testimony. Accordingly, the trial court did not err in not instructing the jury as to the *actus reus* for each count of indecent liberties with a student.

[2] Next, defendant argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence that J.B. was a “student” during the summer. Specifically, defendant contends that J.B. was not “enrolled” at East Forsyth at the time of the incidents because a person is “enrolled” only during the academic school year. 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.

At trial, the court instructed the jury that a “student,” for purposes of N.C. Gen. Stat. 14-202.4(A), means “a person enrolled in kindergarten, or in grade one through 12 in any school.” Defendant contends that a person is only “enrolled” during the academic year; thus, since the offenses occurred during the summer, J.B. was not enrolled, nor was he a student, at East Forsyth. In support of his argument, defendant claims that each school completes an “Initial Enrollment” count at the beginning of each school year, and students do not become enrolled at a school until that initial count.

However, at trial, Patricia Gainey, the principal of East Forsyth, testified that students remain enrolled at her school until a parent withdraws them. Although students are required to register for fall classes during the spring, students remain in the school’s database until a parent “signs them out.” J.B.’s mother testified at trial that J.B. had registered for his fall classes in April or May 2011, the spring before the incidents occurred. Since J.B.’s mother did not withdraw him from East Forsyth until the end of the 2011 school year (June 2012), he remained enrolled at East Forsyth during the summer of 2011 even though he was not taking classes at that time. In other words, he remained in East Forsyth’s

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database, and, thus, remained enrolled, until June 2012. Therefore, during the summer, although the academic year was over, he was an enrolled student at East Forsyth. Accordingly, the trial court did not err in instructing the jury that a “student” includes anyone enrolled in a school and in denying defendant’s motion to dismiss because the State presented substantial evidence that J.B. was a student at the time of the offenses.

Conclusion

Based on the foregoing reasons, we conclude that defendant’s trial was free from error.

NO ERROR.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA
v.
ALEXANDER SCOTT TALBOT

No. COA13-1077

Filed 3 June 2014

1. Jury—deliberations—playing surveillance video twice—not an expression of opinion by trial court

The trial court did not err in a common law robbery case by replaying a surveillance video twice during jury deliberations. Merely playing a moving picture (video) of an event which did not contain any audio, so that the jurors would have an ample opportunity to review this evidence without having to ask to see the tape again later, did not constitute error nor did such an action by the trial court express any opinion. Jurors are presumed to follow jury instructions and curative instructions, including the one given in this case that jurors should not think the judge had any opinion.

2. Evidence—video—photographs—jury instruction

The trial court did not err in a common law robbery case by failing to instruct the jury in accordance with N.C.P.I.-Criminal 104.50. While the trial court did not clarify which portion of the instruction as given applied to the video or to the other photos, it hardly seemed likely that the jury failed to understand the distinction.

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[234 N.C. App. 297 (2014)]

3. Damages and Remedies—restitution—sufficiency of evidence

The trial court erred in a common law robbery case by ordering restitution without sufficient evidence. The sentence of restitution was vacated and the case was remanded for a new sentencing hearing on this sole issue.

Appeal by Defendant from judgment entered 3 May 2013 by Judge Alma L. Hinton in Wilson County Superior Court. Heard in the Court of Appeals 5 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Deborah M. Greene, for the State.

Bowen and Berry, PLLC, by Sue Genrich Berry, for the defendant.

McCULLOUGH, Judge.

Alexander Scott Talbot, (“Defendant”) was indicted on 30 December 2012 for the offense of Common Law Robbery. He was tried in Wilson County Superior Court, Judge Alma L. Hinton, presiding and on 3 May 2013 convicted of Larceny from a Person at which time he was sentenced to a minimum of eight (8) months and maximum of nineteen (19) months in the custody of the North Carolina Department of Corrections. Defendant was also ordered to pay \$44.00 in restitution. On 9 May 2013, Defendant filed Notice of Appeal. After a careful review of the proceedings below we find No Error in the trial conducted in Superior Court, but vacate the sentence of restitution and remand for re-sentencing on that issue.

I. Background

On 7 September 2012, Defendant’s father who is the owner and operator of a business called 8 Ball Cycle Work in the Wilson area, requested that Defendant watch his shop while he ran some errands. On that date, Defendant, his girlfriend, Cassandra Setzer (“Setzer”) and Jamy Reid (“Reid”), a friend of Defendant who on occasion lived with Defendant, left his apartment traveling to the father’s business. Along the way the trio stopped at Valvoline to pay for some repairs made to Defendant’s Jeep before reaching his father’s business. Defendant began to have concerns about the repairs as he heard noises coming from his Jeep, so all three proceeded to an auto parts store to buy parts. Before returning to 8 Ball Cycle, they made a stop at McDonald’s. While at McDonald’s Reid announced he was going to go make some money. Reid then left. After

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receiving a call from his father about the length of time it was taking for Defendant to arrive at his business, Defendant informed Setzer that he was going to go find Reid.

Churchwell's Jewelers, a near-by custom jewelry business was open as it was now past 10:00 a.m., its opening time, and jewelry had been placed in glass-top counter displays. The owners, Angie and Anderson Bass were present in their upstairs office over-looking the showroom while two employees, Cora Wooten and Ashley Townsend, were on the main floor. Ms. Wooten moved to the display case when Reid entered the store while Mr. Townsend, who was in the repair area, stood up and watched Reid. After Reid asked to see some rings, Ms. Wooten removed a display of rings from inside a glass case in order to show them to Reid. Shortly thereafter, Defendant entered the store. At this juncture, one of the owners, Mr. Bass, came downstairs to the showroom and Defendant asked Mr. Bass what time the restaurant located next door opened for business. When Mr. Bass replied that the restaurant opened at 5:00 p.m. Defendant began to exit the store and opened the door. At that moment Reid grabbed the ring display and ran out the open door behind Defendant. Reid ran in one direction and Defendant walked in another, until Townsend caught up with Defendant and requested he return to the store.

Reid ran back to McDonald's, got in the back seat of the Jeep, and told Setzer to drive. While doing so, she called Defendant, and learned he was being held for acting as a decoy. Once the police arrived, a look-out for the Jeep was issued and shortly thereafter Reid and Setzer were taken into custody. A consent search resulted in officers discovering the stolen jewelry hidden inside an antifreeze container in the rear of the Jeep.

II. Discussion

On appeal the Defendant raises three issues, (1) Did the trial court err in re-playing the surveillance video twice during jury deliberations; (2) Did the trial court err by failing to instruct the jury in accordance with N.C.P.I.-Criminal 104.50; and (3) Did the Court err in ordering restitution without sufficient evidence?

1. Did the Trial Court Err by Playing Video Surveillance Tape Twice, Thereby Expressing an Opinion in Contravention of N.C.G.S. § 15A-1222?

[1] Following the trial and closing arguments, the trial court instructed the jury that they should not think the judge had any opinion stating:

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[the trial court had] implied any of the evidence should be believed or disbelieved, that a fact has been proven or not or what your findings ought to be. Instead you alone are to find the facts and render a verdict reflecting the truth.

Defendant now argues, that despite the preceding instruction, by re-playing the jewelry store surveillance tape of this incident, the trial court overly emphasized Defendant's role thus implicitly commenting on Defendant's guilt. We do not believe this argument has merit.

Shortly after the jury began considering Defendant's case, the jury requested to review certain exhibits that had been admitted during the trial. These exhibits included certain photographs, a copy of Defendant's statement, a copy of Setzer's statement and a receipt. The trial court agreed to allow the jurors to review these exhibits in the courtroom without objection. Before the exhibits could be given to the jury, the foreperson asked if the jury could also review the jewelry store video surveillance film. The prosecutor announced that the equipment could be set up to re-play the tape. The foreperson requested that the tape be played from the point where Defendant entered the store. Following the first playing of the video, the trial judge instructed the prosecutor to play the tape a second time. This action was taken without a request from either counsel. The jury then resumed its deliberations finding Defendant guilty as previously stated.

As a preliminary matter, it should be noted that the court was well within its discretion in permitting the inspection of evidence including the re-playing of the video. In N.C. Gen. Stat. § 15A-1233(a) it is provided that:

[i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in [her] discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In [her] discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2013).

The decision by the trial court to either grant or deny a jury's request to review evidence previously admitted lies within the court's discretion,

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State v. Johnson, 346 N.C. 119, 124, 484 S.E.2d 372, 375 (1997) and it is presumed that the court does so in accordance with this statute. *State v. Weddington*, 329 N.C. 202, 208, 404 S.E.2d 671, 675 (1991). When the examination takes place in open court as in the case at bar, there is no necessity for obtaining the consent of the parties. *State v. Lee*, 128 N.C. App. 506, 509, 495 S.E.2d 373, 375, cert. denied 348 N.C. 76, 505 S.E.2d 883 (1998). Thus, in the case now before us we fail to see how merely playing a moving picture (video) of an event which evidently did not contain any audio, so that the jurors would have an ample opportunity to review this evidence without having to ask to see the tape again later, constitutes error nor do we see how the trial court by such an action expresses any opinion whatsoever. Jurors are presumed to follow jury instructions and curative instructions, including the one given in this case as set forth above, *State v. Little*, 56 N.C. App. 765, 770, 290 S.E.2d 393, 396 (1982). We do not believe the record demonstrates the court rendering any opinion about Defendant's guilt rather the record demonstrates the court properly instructed the jury wherein the court stated it was expressing no opinion. The record also demonstrates that the trial judge complied with the proper statutory method of allowing jurors to review evidence which they had previously examined. Appellant's arguments to the contrary are overruled.

2. Did the Trial Court Commit Prejudicial Error by Failing to Properly Instruct Pursuant to N.C.P.I.-Criminal 104.50?

[2] During the charge conference, Defendant's counsel requested that the court issue N.C.P.I.-Criminal 104.50 which states "A photograph was introduced into evidence in this case for the purpose of illustrating and explaining the testimony of a witness. This photograph may not be considered by you for any other purpose." The State requested the court instruct that the video could be viewed as substantive evidence. The trial judge informed counsel that N.C.P.I.-Criminal 104.50A includes both. This instruction provides, in part, "A [photograph] [video] was introduced into evidence in this case. This [photograph] [video] may be considered by you as evidence of facts it illustrates or shows." The trial court instructed the jury in accordance with the latter pattern instruction, without any additional objection.

When a party, requests an instruction which is supported by the evidence, it is recognized that a failure to give that instruction or an instruction in substantial conformity thereto is error. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). When defendant requests an instruction which was not given, the lack of objection does not waive the error and the issue is deemed preserved. *State v. Ross*, 322 N.C. 261,

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265-66, 367 S.E.2d 889, 891-92 (1988). In the case *sub judice* some photographs were for illustrative purposes, those being the photos of the jewelry shop and its goods while the video was undoubtedly admitted as substantive evidence depicting actual events that transpired. While the trial judge did not clarify which portion of the instruction as given applied to the video or to the other photos it hardly seems likely that the jury failed to understand the distinction and it is difficult to see how the muddled instruction prejudiced Defendant. Accordingly, this argument is likewise overruled.

3. Restitution

[3] Although we are constrained by the Supreme Court's ruling in *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010) to review restitution awards on appeal regardless of whether a defendant has objected to the restitution amount at trial, we note that this issue is frequently before this Court due to easily correctable errors. As this Court noted in *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011), "the quantum of evidence needed to support a restitution award is not high." In the interest of judicial economy, we urge prosecutors and trial judges to ensure that this minimal evidentiary threshold is met before entering restitution awards.

Here, the trial judge entered an order directing that Defendant repay Churchwell's Jewelers the sum of \$44.00. There is no evidentiary support for this amount in the record and both parties concede the trial court erred in ordering restitution. An order of restitution must be supported by evidence, *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) and neither a prosecutor's unsworn statement nor a restitution worksheet is adequate to support an order of restitution, *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010). Here Appellant argues that Defendant is entitled to a new sentencing hearing on the issue of restitution and the State agrees. Therefore the sentence of restitution is vacated and the case remanded for a new sentencing hearing on this sole issue.

III. Conclusion

In summary, we find no error in Defendant's conviction and sentence save for the issue of restitution. The order of restitution is vacated and the case is remanded for re-sentencing on the issue of restitution only.

No Error, Restitution Order Vacated and Remanded.

Judges HUNTER, Robert C. and GEER concur.

TEMPLETON PROPS. LP v. TOWN OF BOONE

[234 N.C. App. 303 (2014)]

TEMPLETON PROPERTIES LP, PETITIONER

v.

TOWN OF BOONE, RESPONDENT

No. COA13-1274

Filed 3 June 2014

1. Zoning—harmony with surrounding area—issue of law and fact—standard of review

The issue of whether the superior court erred in a zoning case by concluding as a matter of law that the Boone Board of Adjustment considered the wrong “area” when assessing a proposed clinic’s harmony with the adjacent community was reviewed as a mixed question of fact and law, applying both de novo review and the whole record test.

2. Zoning—special use permit—harmonious with area—definition of area—fact specific

Where a zoning ordinance provided the Boone Board of Adjustment with the ability to deny a special use permit if the application would not be in harmony with the area in which it was located, a fact-specific inquiry was necessarily required to define “area.” The superior court improperly acted as a finder of fact on review and imposed its view of what the bounded “area” should be, rather than reviewing whether the Board’s findings of fact concerning the area were supported by competent evidence and not arbitrary and capricious.

3. Zoning—special use permit—prima facie case—rebuttal

Although petitioner argued that a Boone zoning ordinance allowed construction of its medical clinic under a special use permit, a prima facie case that a petitioner was entitled to a special use permit could be rebutted by competent, material, and substantial evidence that the use contemplated was not in fact in harmony with the area in which it was to be located.

4. Zoning—special use permit—harmony with area—evidence sufficient to support findings

There was competent evidence in a special use zoning case supporting the Board of Adjustment’s finding that a medical clinic would not be in harmony with its surrounding area and the superior court erred by overturning the Board’s decision to deny the special use permit.

TEMPLETON PROPS. LP v. TOWN OF BOONE

[234 N.C. App. 303 (2014)]

Appeal by respondent from order entered 7 August 2013 by Judge Shannon R. Joseph in Watauga County Superior Court. Heard in the Court of Appeals 20 March 2014.

The Brough Law Firm, by Michael B. Brough; and di Santi Watson Capua & Wilson, by Anthony S. di Santi and Chelsea B. Garrett, for Petitioner-appellee.

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

HUNTER, JR., Robert N., Judge.

The Town of Boone (“Boone”) appeals the superior court’s 7 August 2013 order reversing a decision of the Town of Boone’s Board of Adjustment (“Board”) that denied Templeton Properties L.P.’s (“Templeton”) application for a zoning permit. We reverse the superior court’s order.

I. Facts & Procedural History

This is the third time this Court has reviewed this case. *See Templeton Properties, L.P. v. Town of Boone*, ___ N.C. App. ___, ___, 724 S.E.2d 604, 605 (2012) (“*Templeton II*”); *Templeton Properties LP v. Town of Boone*, 198 N.C. App. 406, 681 S.E.2d 566, 2009 WL 2180620 (2009) (unpublished) (“*Templeton I*”).

The dispute centers around Templeton’s 2.9 acre lot (“the Parcel”) in Boone at 315 State Farm Road. The Parcel is zoned for single-family residential use (“R-1”), but has historically been used as a church under a special use permit. *Templeton I*, 2009 WL 2180620 at *1. The church is 2,250 square feet and is located between State Farm Road and VFW Drive in Boone, which provide routes of access to the Parcel. *Id.* The surrounding neighborhood is “composed of mostly single-family residences,” except for a non-residential VFW hall located near the Parcel. *Id.* Under section 165 of Boone’s then-existing unified development ordinance (“UDO”), medical clinics over 10,000 square feet were allowed in R-1 zoning with a valid special use permit. Applications for special use permits may be denied by the Board upon showing of at least one of four reasons set forth in UDO § 69(c), namely that the development

- (1) Will materially endanger the public health or safety, or
- (2) Will substantially injure the value of adjoining or abutting property, or

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(3) Will not be in harmony with the area in which it is to be located, or

(4) Will not be in general conformity with the comprehensive plan, thoroughfare plan, or other plan officially adopted by the council.

On 28 September 2006, Templeton submitted an application to Boone to obtain a special use permit to place a 13,050 square foot medical clinic on the Parcel. *Id.* The Board denied the application as incomplete. *Id.* Templeton modified its application and resubmitted it on 2 March 2007 to address the Board's concerns, including decreasing the clinic's size to 10,010 square feet, the current proposed size of the clinic. *Id.*

On 1 May 2007 the Board rejected Templeton's application. *Templeton II*, ___ N.C. App. at ___, 724 S.E.2d at 606. The Watauga County Superior Court granted a writ of certiorari and then entered an order on 7 July 2008 reversing the Board's denial of Templeton's application for the special use permit. *Id.* Boone appealed to this Court and we remanded to the Board to issue reviewable findings of fact in *Templeton I*. *Id.* at ___, 724 S.E.2d at 606–07.

On 2 September 2010, the Board met to make findings of fact relating to the special use permit after the remand. *Id.* After taking testimony from residents and Templeton's counsel, the Board made findings of fact and approved them via a written decision on 29 September 2010. *Id.* On 27 October 2010, Templeton appealed the Board's decision to the superior court by petition for writ of certiorari, which was granted the same day. *Id.* On 21 February 2011, the superior court affirmed the Board's decision. *Id.* Templeton then appealed the superior court's decision to this Court, resulting in *Templeton II*. *Id.* This Court remanded in *Templeton II* and required the Board to "make reviewable findings of fact . . . based only upon the testimony and evidence presented at the hearings held on 5 April and 1 May 2007" due to defects in additional testimony taken by the Board after the first remand. *Id.* at ___, 724 S.E.2d at 614. We adopt the remaining statements of fact and procedural history in *Templeton I* and *Templeton II*.

On remand, the Board again denied Templeton's application for a special use permit on 4 October 2012 via an identical order as we considered in *Templeton II*. The Board made twenty-one findings of fact relating to the proposed clinic's lack of harmony within the order:

3. Templeton's proposed clinic would be 10,010 square feet in size and would have 67 parking spaces distributed among four different parking lots.

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4. The clinic and its parking lots would have 23 light poles. These light poles would produce a glow at night visible from neighborhood residents' homes and yards. Further, some people in the surrounding neighborhood live on properties that are at a higher elevation than the Lot, and those people would look down on the well-lit clinic. The shields that Templeton proposed for the poles' light bulbs would not prevent light from bleeding into the neighborhood.
5. Templeton plans for employees and patients to access the clinic from State Farm Road, and Templeton plans to add a left-turn lane from State Farm Road into the clinic.
6. The clinic would have a large dumpster pad, though Templeton did not specify how many dumpsters would be on this pad.
7. Templeton had not found a tenant for the clinic and did not know what kind of medical procedures would be performed there or what types of medical wastes might be produced. Templeton did acknowledge, however, that some wastes produced at the clinic could be hazardous.
8. The only development currently on the Lot is a 2,250 square-foot church. The church has few lights, and it generally has traffic only on weekends.
9. The area surrounding the Lot is predominantly zoned R-1 Single Family Residential. The surrounding area has been almost uniformly zoned R-1 Single Family Residential since the Town first adopted zoning for the area in 1979.
10. The area surrounding the Lot is a residential neighborhood, one of [the] oldest in Boone. It is more consistently residential, with fewer non-residential developments, than other residential neighborhoods in Town. The Lot's surrounding area also has more preserved trees and vegetation than other areas in Boone.
11. Next door to the Lot is a VFW hall. Although the VFW hall is non-residential, it is grandfathered because it was built before Boone adopted zoning in 1979.
12. Except for the VFW hall, properties in the Lot's surrounding area are almost all single-family homes.

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13. During the hearing, Templeton offered the results of a survey that it had conducted of development along a stretch of State Farm Road. Some properties in this survey were non-residential.

14. However, Templeton's survey was not limited to the area where the clinic would be located. Instead, Templeton's survey extended almost a mile away from the Lot, into other areas of Town. The survey also focused on properties fronting State Farm Road, which caused it to exclude many properties that, although not fronting on the road, were still part of the area where the clinic would be located.

15. Templeton's survey did not accurately reflect the character of the area in which the clinic would be located.

16. The Lot's surrounding area is separated from less residential parts of Boone, including those less residential parts covered in Templeton's survey, by distance, topography, and the curves in State Farm Road. As a result, the Lot's surrounding area is a distinct and separate residential neighborhood.

17. Templeton's appraiser, in describing the Lot's surrounding area, also concluded that the only developments in the surrounding area were the VFW hall and single-family homes.

18. The Lot's surrounding area has no medical buildings, offices, or commercial developments.

19. The clinic would introduce a busy commercial operation into an area that is overwhelmingly residential in character.

20. At 10,010 square feet, the clinic would be much larger than the single family homes that predominate in the surrounding area.

21. The clinic would produce far more traffic than other properties in the Lot's surrounding area and would produce a level of traffic out-of-character for that area.

22. No properties in the Lot's surrounding area produce as much light as the clinic would produce. The clinic's

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lighting would not be in keeping with the type and level of lighting currently found in the surrounding area.

23. Templeton's proposed clinic would not be in harmony with the area in which it would be located.

On 6 November 2012, Templeton appealed the denial of its application to the Watauga County Superior Court. On 7 November 2012, the superior court issued an *ex parte* writ of certiorari. On 7 August 2013, the superior court entered an order reversing the Board's denial of Templeton's application. In its third conclusion of law, the superior court found

3. The Board's determination that Petitioner's proposed use is not in harmony with the area rests on an overly-restrictive application of the term "area," which amounts to a misinterpretation of the applicable standard. In this case, the relevant "area" within the meaning of the ordinance is not limited to the residences that lie north of the subject site and that do not front State Farm Road but includes similarly situated properties along State Farm Road that are in reasonable proximity to the subject site. The undisputed evidence in the record is that most of those properties are used for office, institutional, and commercial — not residential — purposes. Therefore, the Board's conclusion that the proposed use is not in harmony with the area in which it is to be located is not supported by the evidence.

Also, the Board's findings on lack of harmony generally and impermissibly cite impacts that are inherent in the nature of the proposed use. As matter of law, a board of adjustment cannot deny an application for lack of harmony on the basis that a use deemed conditionally permissible by the local legislative body would produce impacts common to all such uses — for to allow such a decision would be to empower the board to substitute its judgment for that of the elected governing body. All of the Board's findings in this case are of that nature, and as a matter of law do not support the Board's conclusion that the proposed use would not be in harmony with the area in which it is to be located.

The superior court's order also found that Finding of Fact 10 was not supported by competent evidence.

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In its fourth conclusion of law, the superior court found the Board's determination that Templeton's proposed use would not be in conformity with the town's comprehensive plan was based on "general policy statements in the comprehensive plan" and was not a sufficient basis to deny Templeton's application. The superior court also found the Board erred in finding that the proposed use would materially endanger public safety, as "there was not competent, material and substantial evidence to support such a conclusion." Boone filed notice of appeal on 26 August 2013 and a second notice of appeal on 5 September 2013 to correct the filing number listed on the initial notice of appeal.

II. Jurisdiction & Standard of Review

Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2013) (stating a right of appeal lies with this Court from the final judgment of a superior court "entered upon review of a decision of an administrative agency").

[1] Boone first argues that the superior court erred by improperly acting as a fact-finder in its determination of the "area" considered by the Board's harmony analysis. "[T]his Court examines the trial court's order for error[s] of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Turik v. Town of Surf City*, 182 N.C. App. 427, 429, 642 S.E.2d 251, 253 (2007) (second alteration in original) (internal quotation marks omitted) (quoting *Tucker v. Mecklenburg Cnty. Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001)).

Here, the superior court erred when it concluded as a matter of law that the Board considered the wrong "area" when assessing the clinic's harmony with the adjacent community. This issue is more properly construed as a mixed question of fact and law. See *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) (finding a trial court mislabeled a mixed question of fact and law as a finding of fact); *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 202 N.C. App. 631, 636, 689 S.E.2d 880, 883 (2010), *rev'd on other grounds*, 365 N.C. 152, 712 S.E.2d 868 (2011).

In *Morris*, this Court held (i) that interpretation of a term in a zoning ordinance was a question of law and (ii) that determining whether the specific actions of a petitioner fit within that interpretation was a question of fact reviewable under the whole record test. *Morris*, 202 N.C. App. at 636, 689 S.E.2d at 883. This Court relied on *Whiteco Outdoor Adver. v. Johnston Cnty. Bd. of Adjust.*, 132 N.C. App. 465, 513 S.E.2d 70 (1999), which prescribed *de novo* review of a petitioner's alleged error

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of law, but also provided deference to a board of adjustment's interpretation of its own ordinance under that *de novo* review. *Id.* at 470, 513 S.E.2d at 74. The Supreme Court rejected this Court's application of a deferential *de novo* standard, stating that "[u]nder *de novo* review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris*, 365 N.C. at 156, 712 S.E.2d at 871. The Supreme Court did not reverse this Court's finding that interpreting "work" was properly considered a mixed question of law and fact. *Id.*

Thus, we review the superior court's determination that the Board erred in its definition of "area" in two parts: (i) whether the Board's interpretation of the ordinance's use of "area" prescribed was an error of law under *de novo* review and (ii) whether the specific findings of fact used to define the area were supported under the whole record test.

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).

"When utilizing the whole record test, . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (quotation marks and citation omitted). "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

III. Analysis

A. Defining Area in the Ordinance

[2] As discussed *supra* in Section II, the definition of "area" in the ordinance is a mixed question of law and fact subject to *de novo* review. "[O]ne of the functions of a Board of Adjustment is to interpret local zoning ordinances." *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992). "[R]eviewing courts may make independent assessments of the underlying merits of board of adjustment ordinance interpretations. This proposition emphasizes

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the obvious corollary that courts consider, but are not bound by, the interpretations of administrative agencies and boards.” *Morris*, 365 N.C. at 156, 712 S.E.2d at 871 (quotation marks and citation omitted).

In *Morris*, the Supreme Court compared a board of adjustment’s interpretation of the term “work” to the actual ordinance:

[W]e find the BOA’s interpretation of the term “work” unpersuasive. The ordinance provides that:

“If the work described in any compliance or sign permit has not begun within six months from the date of issuance thereof, the permit shall expire. Upon beginning a project, work must be diligently continued until completion with some progress being apparent every three months. If such continuance or work is not shown, the permit will expire.”

City of Bessemer City, N.C., Ordinance § 155.207.

Bessemer City’s zoning administrator testified at the BOA hearing that he interpreted the term “work” to mean “actually something moving on the ground . . . [c]onstruction.” In his view, Fairway failed to commence “work” within the time period prescribed in the sign permit because he did not observe construction-like activities occurring on the property. He therefore concluded the sign was relocated without a valid sign permit.

In contrast, Fairway argues the term “work” encompasses the broader range of activities necessary to complete the sign relocation. Fairway contends its negotiations with DOT and Dixon, as well as its acquisition of a county building permit, constitute “work” under the ordinance. We agree with Fairway that the term “work” has a broader meaning than mere visible evidence of construction.

Id. at 156–57, 712 S.E.2d at 871.

We consider the phrase “area” here and the Board’s interpretation of it. The ordinance provides the Board with the ability to deny a special use permit if the application “[w]ill not be in harmony with the area in which it is located.” A fact-specific inquiry is necessarily required to define “area” in this context, as each individual application for a special use permit will have different surrounding areas the Board will need to consider when determining whether the property would be harmonious

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with its surroundings. This scenario is much like our Supreme Court's interpretation of the phrase a "reasonable time":

If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them that the question ever becomes one of law.

Claus-Shear Co. v. E. Lee Hard Ware House, 140 N.C. 552, 555, 53 S.E. 433, 435 (1906). Conversely, if the Board made a determination of what "area" generally meant within the ordinance and there was no disagreement about the area in question,¹ a trial court's *de novo* analysis of the Board's conclusion of law, that being an interpretation of "area" within the ordinance, would be appropriate.

Here, the Board used the term "area" as it related to specific findings of fact, which was the proper application under UDO § 69(d). Finding of fact #13 considered Templeton's offered survey, which included non-residential developments further down State Farm Road. Finding of fact #14 noted that Templeton's evidence "extended almost a mile away" from the Parcel and that Templeton's survey excluded several properties fronting State Farm Road that the Board considered part of the "area." Finding of fact #16 stated that "distance, topography, and the curves in State Farm Road" separated the Parcel from the commercial properties cited by Templeton as being part of the "area." Finding of fact #17 noted that Templeton's appraiser concluded "that the only developments in the surrounding area were the VFW hall and single-family homes." These findings, amongst others, are a proper contextual usage of "area" as laid forth in the ordinance and are inherently fact specific.

Beyond reviewing the Board's actions, this Court reviews whether the superior court correctly performed its several tasks in its reviewing capacity:

1. For example, if the Board made a finding that "area" categorically included all adjacent properties within the R-1 zoning area.

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[T]he task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

“When the petitioner correctly contends that the agency’s decision was either unsupported by the evidence or arbitrary and capricious, the appropriate standard of review for the initial reviewing court is ‘whole record’ review. If, however, petitioner properly alleges that the agency’s decision was based on error of law, *de novo* review is required.” *Tucker*, 148 N.C. App. at 55, 557 S.E.2d at 634. As such, the superior court conducts a *de novo* review under the first three tasks and a “whole record” review for the final two tasks.

Here, the superior court improperly acted as a finder of fact on review and imposed its own view of what the bounded “area” should be, rather than reviewing whether the Board’s findings of fact concerning the area were supported by competent evidence and not arbitrary and capricious. The superior court held that the fact-specific definition of “area” as used by the Board should have included “similarly situated” properties that are “in reasonable proximity to the subject site.” “In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board.” *Coastal Ready-Mix Concrete Co., Inc.*, 299 N.C. at 626, 265 S.E.2d at 383. If findings of fact about the “area” affected here were supported by evidence, they must stand even if conflicting evidence may have allowed the superior court to reach a different result under *de novo* review. *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997).

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By improperly acting as a trier of fact, the superior court erred and we reverse its order.

B. Rebuttal of a Presumed Legislative Finding

[3] Templeton also contends that because Boone’s R-1 zoning allowed construction of its clinic under a special use permit, Boone’s legislative determination that clinics are entitled to receive special use permits should have been enforced. Templeton cites a number of cases in support of this proposition. See *Woodhouse v. Bd. of Comm’rs of Nags Head*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980) (“Where an applicant for a conditional use permit produces competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, prima facie he is entitled to it.” (citation and quotation marks omitted)); *Blair Investments, LLC v. Roanoke Rapids City Council*, ___ N.C. App. ___, ___, 752 S.E.2d 524, 527 (2013); *Habitat for Humanity of Moore Cnty., Inc. v. Bd. of Comm’rs of Pinebluff*, 187 N.C. App. 764, 768, 653 S.E.2d 886, 888 (2007); *MCC Outdoor, LLC v. Franklinton Bd. of Comm’rs*, 169 N.C. App. 809, 814, 610 S.E.2d 794, 797 (2005); *Clark v. City of Asheboro*, 136 N.C. App. 114, 122, 524 S.E.2d 46, 52 (1999); *Vulcan Materials Co. v. Guilford Cnty. Bd. of Cnty. Comm’rs*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (1994) (“The inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan.”).

Of the preceding cases, Templeton argues that *Woodhouse* uses a “legislative finding” rule and that *Vulcan* is a “less-restrictive” formulation of the *Woodhouse* test. We do not see conflict between the two cases, which both allow the presumption of granting the special use permit to be rebutted by the party opposing its issuance. See *Blair*, ___ N.C. App. at ___, 752 S.E.2d at 528–29 (citing *Woodhouse* and holding that after a petitioner “makes a prima facie showing of entitlement to a special use permit, the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit” so long as denial is “based upon findings which are supported by competent, material, and substantial evidence appearing in the record” (citation and quotation marks omitted)). Thus, while showing that entitlement to a conditional or special use permit creates a prima facie case that a petitioner is entitled to a special use permit, the prima facie case may be rebutted by “competent, material, and substantial evidence [showing the] use contemplated is not in fact in harmony with the area in which it is to be located.” *Vulcan*, 115 N.C. App. at 324, 444 S.E.2d at 643 (citations and quotation marks omitted).

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Accordingly, we must consult the record to determine whether “competent, material, and substantial” evidence existed to support the Board’s harmony analysis. *Id.*

C. Findings of Fact Supporting Board’s Decision to Deny the Special Use Permit

[4] As noted *supra* in Section II, we now review whether the Board’s findings of fact were supported by competent evidence under the whole record test. At the outset, we note that

[A] city council’s denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. Speculative assertions, mere expression of opinion, and generalized fears “about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body.” In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

Blair, ___ N.C. App. at ___, 752 S.E.2d at 529 (quotation marks and citation omitted). Were the Board’s findings concerning the area’s characteristics solely based on the testimony of individuals affected by development of the Parcel, denial of the permit on those grounds might be impermissible. However, several findings of fact concern the nature of the Parcel and the surrounding area which buttress its decision:

- Finding of fact #3 notes that there would be sixty-seven parking spaces at the clinic.
- Finding of fact #4 describes the twenty-three light poles on the clinic’s grounds as well as issues with the shielding on the lights affecting the surrounding residents.
- Finding of fact #5 describes Templeton’s proposed left-turn lane to allow access from State Farm Road.
- Finding of fact #6 describes the clinic’s proposed “two large dumpster pads,” and that Templeton could not estimate how many containers would be placed on the pads.
- Finding of fact #7 noted the uncertainty of the type of clinic that would locate at the facility.

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- Finding of fact #8 noted the size, limited weekend use, and lack of lighting by the current church structure on the Parcel.
- Finding of fact #9 noted the historical tendency to zone the surrounding area as R-1.
- Finding of fact #11 noted that the VFW Hall adjacent to the Parcel was grandfathered into existence because it was built before Boone adopted zoning.
- Finding of fact #12 noted that the surrounding area was primarily comprised of single family homes.
- Findings of fact #13, #14, and #15 found that Templeton's survey was not limited to an area that accurately reflected the character of the area near the Parcel, extended close to a mile away from the Parcel, and excluded several properties not fronting State Farm Road.
- Finding of fact #16 finds that the Parcel is separated from the other non-residential parcels cited by Templeton by topography, distance, and road features.
- Finding of fact #17 notes that Templeton's appraiser described the Parcel's surrounding area as the VFW hall and single family homes.
- Findings of fact #18 and #19 note the lack of medical buildings, offices, or other commercial developments in the surrounding area and found that introducing the medical clinic would introduce a "busy commercial operation" into an "overwhelmingly residential" area.
- Findings of fact #20, #21, and #22 note that the clinic would be "much larger" than the surrounding structures, would produce additional traffic, and would create more artificial light than other surrounding structures in the area.

These findings were based on testimony, photographs of the area, drawings, topographic surveys, and other data compiled by the Board prior to its 4 May 2007 denial of Templeton's application. The foregoing was ample evidence to support a finding that the proposed clinic was not harmonious with its surrounding area. Further, the superior court cited only finding of fact #10 as not being supported by evidence in its order. We disagree and hold that the six residents' testimony of the area regarding its contents constituted competent evidence supporting finding of

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fact #10.² Accordingly, there was competent evidence supporting the Board's finding that the medical clinic would not be in harmony with its surrounding area pursuant to UDO § 69(c)(3) and the superior court erred in overturning the Board's decision to deny the special use permit.

Because we hold that the Board's denial of Templeton's special use permit was supported by competent evidence and proper under its harmony analysis, we do not address Boone's remaining arguments concerning conformance with the comprehensive plan or to provide for the public's safety.

IV. Conclusion

For the reasons stated above, the decision of the superior court is

REVERSED.

Judges STROUD and DILLON concur.

2. The testimony included statements from Ben Shoemake who said the Parcel was surrounded by homes and that the commercial development cited by Templeton was further away from the neighborhood that he described as "much smaller." Les Monkemeyer testified that the neighborhood has trees over a century old in the surrounding area. Marc Kadyk, a thirty-year resident of the neighborhood, testified that the area is heavily wooded. Thirty-four year neighborhood resident and Town Mayor Loretta Clawson testified that the area was overwhelmingly used as homes. Thomas and Joan McLaughlin also testified that the neighborhood was residential in nature, that the area was heavily wooded, and that the commercial portion of State Farm Road to the southeast cited by Templeton was dissimilar because it did not have the same amount of vegetation.

**THOMAS JEFFERSON CLASSICAL ACAD. CHARTER SCH. v. CLEVELAND
CNTY. BD. OF EDUC.**

[234 N.C. App. 318 (2014)]

THOMAS JEFFERSON CLASSICAL ACADEMY CHARTER SCHOOL, PIEDMONT
COMMUNITY CHARTER SCHOOL AND LINCOLN CHARTER SCHOOL, PLAINTIFFS
v.
CLEVELAND COUNTY BOARD OF EDUCATION, D/B/A CLEVELAND COUNTY
SCHOOLS, DEFENDANT

No. COA13-893

Filed 3 June 2014

**1. Schools and Education—charter school funding—funding—
restricted funds**

An order involving the sharing of money between the Cleveland County Schools (CSS) and charter schools was remanded for appropriate findings of fact and a determination of whether the funds at issues were “restricted” under the 2010 clarifying amendment to N.C.G.S. § 115C-426 (such amendments apply to all cases pending before the courts when the amendment is adopted, regardless of when the underlying claim arose). Money from the local current expense fund is shared with the charter schools, but not money from restricted funds.

2. Attorney Fees—action against school board—not an agency

The trial court erred in an action against a school board by awarding plaintiff attorney fees under N.C.G.S. § 6-19.1, which allows attorney fees to a party prevailing over a state agency in a civil action. Defendant was not an agency for purposes of that statute.

Appeal by defendant from Judgment entered on or about 13 February 2013 and Order and Judgment entered 2 April 2013 by Judge Jesse B. Caldwell III, in Superior Court, Cleveland County. Heard in the Court of Appeals 23 January 2014.

*Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot and
Matthew F. Tilley, for plaintiffs-appellees.*

*Tharrington Smith, L.L.P., by Deborah R. Stagner, for
defendant-appellant.*

*Allison B. Schafer and Christine T. Scheef for N.C. School Boards
Association, for amicus curiae.*

**THOMAS JEFFERSON CLASSICAL ACAD. CHARTER SCH. v. CLEVELAND
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[234 N.C. App. 318 (2014)]

STROUD, Judge.

The Cleveland County Board of Education, d/b/a Cleveland County Schools (“CCS” or “defendant”), appeals from the judgment entered by the trial court on or about 13 February 2013, wherein it concluded that certain funds that CCS had placed in Fund 8 should have been placed into the local current expense fund and distributed on a pro rata basis to the plaintiff charter schools. CCS also appeals from an order awarding plaintiffs attorneys’ fees. We remand to allow the trial court to apply the correct legal standard. We reverse the trial court’s order awarding attorneys’ fees.

I. Background

On 9 January 2012, Thomas Jefferson Classical Academy Charter School, Piedmont Community Charter School, and Lincoln Charter School (“plaintiffs”) filed a complaint in superior court, Cleveland County, alleging that CCS had failed to pay them the proper per-pupil amount required by statute. Plaintiffs specifically contended that CCS wrongfully moved approximately \$4.9 million from the local current expense fund, which must be shared with the charter schools, to a “special revenue fund,” which is not shared. Plaintiffs alleged that they were owed approximately \$102,480. Plaintiffs sought a declaratory judgment that CCS must allocate the funds as plaintiffs contended the statute required, recovery in the amount of \$102,480, and attorneys’ fees under N.C. Gen. Stat. § 6-19.1. CCS answered, denying that their transfer of the funds to the special revenue fund violated any of the applicable statutes and that plaintiffs were owed anything.

The case was tried by the superior court sitting without a jury. The parties each presented evidence to support their claims. Plaintiffs primarily relied on the testimony of David Lee, financial director for CCS. Mr. Lee prepared an audit report of CCS’ finances, which used various state budget codes for different revenue sources. Many of the funding sources that CCS had placed in the special revenue fund were classified by Mr. Lee as “unrestricted.” Defendant presented a number of witnesses who administered various programs within the CCS system who testified about their funding sources and the use of those funds. After two days of testimony, the trial court took the matter under advisement.

The trial court entered its judgment on 21 February 2013, wherein it found that defendant had misappropriated approximately \$2,781,281 that should have been placed in the current expense fund rather than the

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special revenue fund. It found that Mr. Lee had admitted that \$2,109,377 of the funds, called “Column A,” were “unrestricted.” It further found, based on Mr. Lee’s testimony and that of the other CCS administrators, that \$671,904 of the funds, listed under “Column B” and “Column C” were “(a) part of ‘moneys made available to CCS for its ‘current operating expenses, (b) used by CCS to operate its general K-12 programs and activities, and (c) not restricted to purposes outside CCS’s general educational programs.” It concluded that defendant owed plaintiffs \$57,836 collectively and entered judgment against CCS in that amount. Defendant filed written notice of appeal from the 21 February 2013 judgment on 18 March 2013.

Plaintiffs then filed a petition for attorneys’ fees under N.C. Gen. Stat. § 6-19.1(a). The trial court, by order and judgment entered 2 April 2013, granted plaintiffs’ petition and awarded them \$47,195.90 in attorneys’ fees. Defendant filed written notice of appeal from the 2 April 2013 judgment and order on 30 April 2013.

II. “Restricted” Funds

[1] Defendant argues that the trial court erred in finding that various revenue sources were not “restricted” and concluding that these funds were therefore subject to a per-pupil distribution to the plaintiff charter schools. Recently the Legislature has amended the statute the Judge applied below clarifying the definition of “restricted” funds, so we remand for the trial court to apply this definition to the facts here.

A. Standard of Review

When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts. . . . Evidence must support the findings, the findings must support the conclusions of law, and the conclusions of law must support the ensuing judgment.

Jackson v. Culbreth, 199 N.C. App. 531, 537, 681 S.E.2d 813, 817 (2009) (citations, quotation marks, and brackets omitted).

B. Charter School Funding and the Uniform Budget Statute

The allocation of funds between local school administrative units and charter schools is governed by N.C. Gen. Stat. § 115C-238.29H (2009). That statute requires the local school administrative unit to

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“transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year.” N.C. Gen. Stat. § 115C-238.29H(b). This Court has interpreted the phrase “local current expense appropriation” to be “synonymous with the phrase ‘local current expense fund’ in the School Budget and Fiscal Control Act, N.C.G.S. § 115C-426(e).” *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 347, 563 S.E.2d 92, 98 (2002), *disc. rev. denied*, 356 N.C. 670, 577 S.E.2d 117 (2003). We have further held that charter schools “are entitled to an amount equal to the per pupil amount of all money contained in the local current expense fund.” *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 460, 655 S.E.2d 850, 854 (*Sugar Creek I*), *disc. rev. denied*, ___ N.C. ___, 667 S.E.2d 460 (2008). It is immaterial that the school board has earmarked particular funds for a specific purpose if the funds have been deposited in the local current expense fund. *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 360-61, 673 S.E.2d 667, 676 (*Sugar Creek II*) (holding, *inter alia*, that the trial court did not err in concluding that funds designated for students affected by Hurricane Katrina were subject to per-pupil distribution to charter schools because they were placed in the current local expense fund, as opposed to a separate fund), *disc. rev. denied*, 363 N.C. 663, 687 S.E.2d 296 (2009).

The local current expense fund is defined by N.C. Gen. Stat. § 115C-426(e) (2009):

The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or

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accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C. Gen. Stat. § 115C-426(c) also permits the creation of “other funds . . . to account for trust funds, federal grants restricted as to use, and special programs.” Thus, we have held that “the provisions of Chapter 115C . . . do not require that all monies provided to the local administrative unit be placed into the ‘local current expense fund’ (Fund Two).” *Thomas Jefferson Classical Academy v. Rutherford County Bd. of Educ.*, 215 N.C. App. 530, 543, 715 S.E.2d 625, 633 (2011) (*Thomas Jefferson I*), *disc. rev. denied and app. dismissed*, ___ N.C. ___, 724 S.E.2d 531 (2012). “Restricted funds” kept in a fund separate from the local current expense fund are exempt from per-pupil distribution to the charter schools. *Id.* at ___, 715 S.E.2d at 630 (“[I]f funds are placed in the ‘local current expense fund’ and not held in a ‘special fund,’ they must be considered as being part of the ‘local current expense fund’ used to determine the *pro rata* share due to the charter schools.”). The local school board has the authority to place such restricted funds in a separate fund. *Id.* at ___, 715 S.E.2d at 634 (“*Sugar Creek I* and *II* clearly indicate that it is incumbent upon the local administrative unit to place restricted funds into a separate fund.”); *Sugar Creek I*, 188 N.C. App. at 460-61, 655 S.E.2d at 855. However, we have never defined what “restricted funds” are or who has the authority to make that determination.

Thus, there are two fundamental questions we must address here: (1) does the local school board have discretionary authority to allocate funds into the local current expense fund or a separate fund as it sees fit?; and if not, (2) did defendant here properly classify the funds at issue as restricted?

N.C. Gen. Stat. § 115C-426(e) states that the local current expense fund

shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

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“It is well established that the word ‘shall’ is generally imperative or mandatory.” *Chandler ex rel. Harris v. Atlantic Scrap & Processing*, ___ N.C. App. ___, ___, 720 S.E.2d 745, 750 (2011) (citation and quotation marks omitted), *aff’d and remanded*, ___ N.C. ___, 749 S.E.2d 278 (2013). Consistent with this Court’s decisions in *Sugar Creek I*, *Sugar Creek II*, and *Thomas Jefferson I*, as well as the plain language of N.C. Gen. Stat. § 115C-426(e), we conclude that the local school administrative unit may deposit any “restricted” funds into a fund separate from the current expense fund. See *Thomas Jefferson I*, 215 N.C. App. at 544, 715 S.E.2d at 634; *Sugar Creek I*, 188 N.C. App. at 460, 655 S.E.2d at 855. By contrast, any funds covered by N.C. Gen. Stat. § 115C-426(e) must be deposited into the local current expense fund. We further conclude that the determination of which funds may be placed in a separate fund is not solely in the discretion of the local school board, given the mandatory language found in the budget statute. See *Chandler*, ___ N.C. App. at ___, 720 S.E.2d at 750 (holding that the Industrial Commission has no discretion in determining an interest award when the relevant statute employed the word “shall”).

C. Defining “restricted” funds

“Restricted” is not a term found in any of the relevant statutes. Rather, it is a gloss this Court has put on the statutory definitions found in N.C. Gen. Stat. § 115C-426(c). It was the Court’s shorthand for those monies that can be placed in a separate fund, i.e. those from “trust funds, federal grants restricted as to use, and special programs” which must be accounted for separately. N.C. Gen. Stat. § 115C-426(c).

The guidance from the Department of Public Instruction that we reviewed in *Thomas Jefferson I* indicated that Fund 8 was a new, separate fund “to separately maintain funds that are restricted in purpose and not intended for the general K–12 population in the LEA.” *Thomas Jefferson I*, 215 N.C. App. at 537, 715 S.E.2d at 630. Such funds included:

- (a) State funds that are provided for a targeted non–K–12 constituency such as More–at–Four funds;
- (b) Funds targeted for a specific, limited purpose, such as a trust fund for a specific school within the LEA;
- (c) Federal or other funds not intended for the general K–12 instructional population, or a sub-group within that population, such as funds for a pilot program;

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(d) Indirect cost, such as those associated with a federal grant that represent reimbursement for cost previously incurred by the LEA.

Id.

After the extensive litigation over the definition of “restricted” and “unrestricted” funds, the Legislature passed an amendment to N.C. Gen. Stat. § 115C-426 in 2010 and again in 2013. N.C. Sess. Laws 2010-31, § 7.17(a); N.C. Sess. Laws 2013-355, § 2(a). The statute now clarifies that:

other funds may be used to account for reimbursements, including indirect costs, fees for actual costs, tuition, sales tax revenues distributed using the ad valorem method pursuant to G.S. 105-472(b)(2), sales tax refunds, gifts and grants restricted as to use, trust funds, federal appropriations made directly to local school administrative units, and funds received for prekindergarten programs. In addition, the appropriation or use of fund balance or interest income by a local school administrative unit shall not be construed as a local current expense appropriation included as a part of the local current expense fund.

N.C. Gen. Stat. § 115C-426 (c) (2013).

In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it. A clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment.

Ray v. North Carolina Dept. of Transp., 366 N.C. 1, 8-9, 727 S.E.2d 675, 681 (2012) (citation and quotation marks omitted).

The 2010 amendment to § 115C-426 is fully consistent with the 2009 definition of “restricted” funds used by the Department of Public Instruction that we approved of in *Thomas Jefferson I* and with this Court’s gloss on that statute. See *Thomas Jefferson I*, 215 N.C. App. at 537, 715 S.E.2d at 630. In addition to being consistent with the prior case law, the amendment simply provided a more complete description of the funds which may be excluded from the local current expense fund. “To determine whether the amendment clarifies the prior law

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or alters it requires a careful comparison of the original and amended statutes. If the statute initially fails expressly to address a particular point but addresses it after the amendment, the amendment is more likely to be clarifying than altering.” *Ray*, 366 N.C. at 10, 727 S.E.2d at 682. Therefore, we conclude that the 2010 amendments were clarifying amendments rather than substantive changes. *See id.* at 11, 727 S.E.2d at 683 (concluding that an amendment was a clarifying one “[b]ecause the legislature left essentially all our pre-amendment cases intact”). “[S]uch amendments apply to all cases pending before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment.” *Id.* at 9, 727 S.E.2d at 681.

It is not clear what definition of “restricted” the trial court applied, but it is clear that the definition used was not that laid out by the 2010 amendments. In some instances it followed the budget code assigned by Mr. Lee, but not in others. It considered some reimbursements “restricted,” but others “unrestricted.” Even some pre-K programs were considered “unrestricted.”

The clarifying amendments provide the proper standard with which to determine whether funds are “restricted.” “Restricted” funds, i.e., monies that may be properly placed in a fund separate from the local current expense fund, are those that fall into one of the categories mentioned in N.C. Gen. Stat. § 115C-426(c) as amended. It is clear that the trial court did not apply this standard. We therefore remand to allow the trial court to make appropriate findings of fact and to determine whether the funds at issues are “restricted” under the correct standard of law. *See Powe v. Centerpoint Human Services*, 215 N.C. App. 395, 396, 715 S.E.2d 296, 298 (2011) (remanding for the fact finder to apply the correct legal standard).

On remand, the trial court should make findings about whether the funds at issue here are “reimbursements, including indirect costs, fees for actual costs, tuition, sales tax revenues distributed using the ad valorem method pursuant to G.S. 105-472(b)(2), sales tax refunds, gifts and grants restricted as to use, trust funds, federal appropriations made directly to local school administrative units, [or] funds received for prekindergarten programs.” N.C. Gen. Stat. § 115C-426(c) (2013). If the funds fall into any of these categories, they may be properly considered “restricted,” placed into a separate fund, and not shared on a *pro rata* basis with the charter schools. *See Thomas Jefferson I*, 215 N.C. App. at 544, 715 S.E.2d at 633.

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III. Attorneys' Fees

[2] Defendant next argues that the trial court erred in awarding plaintiff attorneys' fees under N.C. Gen. Stat. § 6-19.1 because a local school board is not a state agency. We agree.

N.C. Gen. Stat. § 6-19.1 (2011) allows the trial court to award attorney's fees to a party prevailing over a state agency in a civil action. This Court has held that the definition of "agency" for the purposes of § 6-19.1 is the same as the definition of an "agency" under the Administrative Procedures Act (APA). *Izydore v. City of Durham (Durham Bd. of Adjustment)*, ___ N.C. App. ___, ___, 746 S.E.2d 324, 326, *disc. rev. denied*, ___ N.C. ___, 749 S.E.2d 851 (2013). The APA defines an "agency" as

an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. *A local unit of government is not an agency.*

N.C. Gen. Stat. § 150B-2(1a) (2011) (emphasis added). Accordingly, we have held that local governmental units, like municipalities and counties, are not subject to the attorney's fees provisions of N.C. Gen. Stat. § 6-19.1. *Izydore*, ___ N.C. App. at ___, 746 S.E.2d at 326 (holding that "local governmental units—such as respondents—are not 'agencies' for purposes of § 6-19.1."). Local school boards and local school administrative units are local governmental units, and, as such, are not "agencies" for the purpose of the APA. *See* N.C. Gen. Stat. § 115C-5(5)-(6) (defining "local school board" as "a city board of education, county board of education, or a city-county board of education" and a "local school administrative unit" as "a subdivision of the public school system which is governed by a local board of education. It may be a city school administrative unit, a county school administrative unit, or a city-county school administrative unit."); *Coomer v. Lee County Bd. of Educ.*, ___ N.C. App. ___, ___, 723 S.E.2d 802, 803 (observing that "local boards of education are generally excluded from the requirements of the APA."), *disc. rev. dismissed*, 366 N.C. 238, 731 S.E.2d 427, *disc. rev. denied*, 366 N.C. 238, 731 S.E.2d 428 (2012).

Plaintiffs contend that the local school boards are subject to § 6-19.1 because we have held that they "are deemed agents of the State for purposes of providing public education." *Kiddie Korner Day Schools*,

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Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 140, 285 S.E.2d 110, 114 (1981), *app. dismissed and disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982). Yet, our Supreme Court has noted that “[a]n agent of the State and a state agency are fundamentally different” *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 885 (1997); *see also Green v. Kearney*, 203 N.C. App. 260, 272, 690 S.E.2d 755, 764 (2010) (noting the distinction between a state agent and a state agency). In that same opinion, the Supreme Court quoted a prior opinion for the proposition that “[i]n no sense may we consider the [Local] Board of Education in the same category as the State Board of Education” *Meyer*, 347 N.C. at 106, 489 S.E.2d at 885 (citation and quotation marks omitted). Thus, local school boards are not state agencies for purposes of the APA and N.C. Gen. Stat. § 6-19.1 simply because they may be considered agents of the State in certain circumstances.

We hold that the trial court erred in awarding plaintiff attorney’s fees under N.C. Gen. Stat. § 6-19.1 because defendant is not an agency for purposes of that statute. Therefore, we reverse the trial court’s order allowing plaintiff’s petition for attorneys’ fees.

IV. Conclusion

For the foregoing reasons, we remand for the trial court to enter a revised judgment with appropriate findings of fact and conclusions of law applying the correct standard as laid out in the 2010 amendments. We reverse the trial court’s order awarding plaintiffs attorney’s fees.

REVERSED in part; REMANDED.

Judges HUNTER, JR., Robert N. and Judge DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 JUNE 2014)

BRAMHALL v. HURBAN No. 13-1069	Gaston (10CVS911)	DISMISSED in part; AFFIRMED in part.
BURROUGHS v. LASER RECHARGE OF CAROLINAS, INC. No. 12-1238	N.C. Industrial Commission (584372)	Reversed and Remanded
DEPT OF TRANSP. v. SCHAD No. 13-1302	Stanly (11CVS809) (11CVS845)	Dismissed
HOPKINS v. HOPKINS No. 13-1229	Forsyth (12CVD8177)	Reversed and Remanded
HUNT v. DURFEE No. 13-1443	Iredell (11CVD1911)	Affirmed
IN RE D.C.M. No. 13-1393	Alleghany (12JT18)	Affirmed
IN RE H.M.B. No. 13-1474	Johnston (11JT166-169)	Affirmed
IN RE O.B. No. 14-88	McDowell (12JA42-45)	AFFIRMED in part, DISMISSED in part.
IN RE W.S. No. 13-1452	Chatham (12JT35)	Affirmed
JACKSON v. TOWN OF LAKE WACCAMAW No. 13-1296	Columbus (11CVS1360)	Affirmed
JOHNSON v. McNAIRY & ASSOCS. No. 13-1138	Guilford (13CVS6142)	Affirmed
KNOWLES v. BENNETT No. 13-1340	Union (08CVD3735)	Affirmed
SIDDLE v. SIDDLE No. 13-1064	Currituck (11CVD45)	Affirmed
SIMPSON v. SIMPSON No. 13-864	Forsyth (95CVD6117)	Dismissed

SKOFF v. US AIRWAYS, INC. No. 13-994	N.C. Industrial Commission (X67234)	Affirmed
STATE v. ANDERSON No. 13-1281	Union (10CRS51012)	No Error
STATE v. BENTON No. 13-1204	Guilford (12CRS74220)	REVERSED in part; VACATED in part.
STATE v. CATALDO No. 13-1343	Rockingham (11CRS50300-01) (11CRS50518)	No error
STATE v. DANIELS No. 13-1197	Pitt (12CRS156)	NO ERROR; REMAND FOR CORRECTION OF A CLERICAL ERROR.
STATE v. DAVIS No. 13-952	Mecklenburg (09CRS240640)	No Error
STATE v. HARRIS No. 13-1217	Durham (06CRS40556)	Affirmed
STATE v. MARTIN No. 13-956	Halifax (12CRS1797) (12CRS51587)	No Error in part; Vacated and Remanded in part.
STATE v. MARTINEZ No. 13-1288	Wake (10CRS4710)	No Error
STATE v. McNEIL No. 13-1285	Brunswick (12CRS50539)	Affirmed
STATE v. MEZA-RODRIGUEZ No. 13-1190	Wake (11CRS216911)	No Error
STATE v. TORRES-ROBLES No. 13-1023	Wake (11CRS207991-95)	No Error
STATE v. VALENTINE No. 13-1370	Guilford (11CRS95540)	Affirmed
STATE v. WILLIAMS No. 13-1250	Wake (10CRS3417)	No Error

GOODMAN v. LIVING CTRS.-SE., INC.

[234 N.C. App. 330 (2014)]

ANNE B. GOODMAN, ADMINISTRATOR OF THE ESTATE OF RICHARD CLYDE BOST,
DECEASED, PLAINTIFF

v.

LIVING CENTERS—SOUTHEAST, INC., D/B/A BRIAN CENTER OF SALISBURY
AND/OR BRIAN CENTER HEALTH & REHABILITATION/SALISBURY, DEFENDANTS

No. COA13-1336

Filed 17 June 2014

**Statutes of Limitation and Repose—accident in nursing facility—
ordinary negligence—statute of limitation rather than repose**

The trial court erred in dismissing a negligence action arising from a falling IV stand in a long-term nursing facility as being in violation of the statute of repose. Defendant's acts or failure to act clearly involved the exercise of manual dexterity as opposed to the rendering of any specialized knowledge or skill and sounded in ordinary negligence rather than medical malpractice. Plaintiff's action was thus subject to the three-year statute of limitations set forth in N.C.G.S. § 1-52(16).

Appeal by plaintiff from order entered 25 July 2013 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 9 April 2014.

DORAN, SHELBY, PETHEL and HUDSON, P.A., by Michael Doran, for plaintiff-appellant.

HAGWOOD ADELMAN TIPTON, by Amy E. Oleska, for defendant-appellee.

ELMORE, Judge.

Anne B. Goodman (plaintiff), representative of the estate of Richard Clyde Bost (the decedent), appeals from an order dismissing her 18 January 2013 complaint against the Brian Center of Salisbury ("defendant" or "Brian Center"). The trial court's order was predicated on the grounds that plaintiff's claims were barred by the statute of repose. We conclude that plaintiff's claims were not in fact barred by the statute of repose. Accordingly, the trial court's order should be reversed, and this case should be remanded for further proceedings consistent with this opinion.

GOODMAN v. LIVING CTRS.-SE., INC.

[234 N.C. App. 330 (2014)]

I. Procedural Background

On or about 22 April 2008, the decedent, at the age of eighty-four, became a permanent resident of the Brian Center, a long-term nursing and rehabilitation facility in Salisbury. On 13 September 2008, defendant, through its agents, allegedly caused an instrumentality for the delivery of I.V. fluids to be improperly positioned next to the decedent's bed. Due to its unstable placement, the instrumentality fell on the decedent causing serious injuries to the decedent's upper body, including blunt trauma to his head, a broken nose, and various cuts and contusions. The decedent was admitted to Rowan Regional Medical Center and treated for his injuries. Once stabilized, he was released to a different nursing home facility where he later died on 6 October 2008. The decedent did not return to the Brian Center at any point after the incident.

On 5 October 2010, plaintiff, on behalf of the decedent's estate, filed a complaint in Rowan County Superior Court seeking an award of damages on the basis of allegations sounding in negligence, wrongful death, and breach of contract. On 18 January 2012, plaintiff voluntarily dismissed her action without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. One year later, on 18 January 2013, plaintiff refiled her action against defendant, asserting the same three causes of action as set forth in her 5 October 2010 complaint. On 25 February 2013, defendant moved for dismissal of plaintiff's action and/or summary judgment in its favor on grounds that (1) defendant was an improper party to the action as it had not held a license or any interest in the requisite facility since 2005, and (2) plaintiff's claims were barred by the statute of repose. On 24 July 2013, the trial court entered an order dismissing plaintiff's action with prejudice after finding that plaintiff's action was barred by the statute of repose. Plaintiff timely appealed to this Court on 23 August 2013.

II. Analysis

On appeal, plaintiff argues that the trial court erred in dismissing her action for failing to timely file under the statute of repose when "the gravamen of the [c]omplaint is ordinary negligence." We agree.

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). Further, when there are no disputed factual issues, issues regarding the application of a statute of limitations

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or statute of repose are questions of law reviewable *de novo*. *Udzinski v. Lovin*, 159 N.C. App. 272, 273, 583, S.E.2d 648, 649 (2003), *aff'd*, 358 N.C. 534, 597 S.E.2d 703 (2004).

According to N.C. Gen. Stat. § 90-21.11(2)(a) (2013), a medical malpractice action is defined as a “civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional [health care] services.” The North Carolina Court of Appeals has defined “professional services” as an act or service “arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.” *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998) (quotation omitted). The distinction between medical malpractice actions and ordinary negligence actions is significant for two primary reasons. First, medical malpractice actions are subject to the statute of repose, which mandates: “[I]n no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]” N.C. Gen. Stat. § 1-15(c). Second, plaintiffs filing a medical malpractice action are required to comply with the certification requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure. *See* N.C. R. Civ. P. § 1A-1, Rule 9(j). Specifically, pursuant to Rule 9(j), any complaint alleging medical malpractice by a health care provider pursuant to N.C. Gen. Stat. § 90-21.11(2)(a) (2013) shall be dismissed unless:

(1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

(2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

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(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

N.C. Gen. Stat. § 1A-1, Rule 9(j).

Defendant contends that plaintiff has waived her right to argue that her action sounded in ordinary negligence because she failed to allege ordinary negligence before the trial court. We disagree. After reviewing the hearing transcript, it is clear that defendant assumed plaintiff's action was one for medical malpractice and therefore based its argument for dismissal, in part, on an alleged violation of the statute of repose. However, a review of plaintiff's complaint reveals that her claims sounded in ordinary negligence. Plaintiff neither referenced "medical malpractice" in her complaint nor did she obtain expert certification pursuant to Rule 9(j). We assume that the trial court found plaintiff's claims sounded in medical malpractice, given its dismissal of the action pursuant to the statute of repose. However, the trial court need not have reached the merits of defendant's argument regarding the statute of repose. Assuming the action was for medical malpractice, the trial court was required to dismiss it on the basis that the complaint lacked a Rule 9(j) certification. *See id.* For the forthcoming reasons, this is not a case in which the statute of repose is applicable, and, accordingly, we must address plaintiff's argument that the action sounded in ordinary negligence.

The crux of the issue before us is whether plaintiff's claims, which stem from an incident in which defendant, acting through its agents, improperly placed an instrumentality for the delivery of I.V. fluids near the decedent such that it fell and injured him, constitute a medical malpractice action or an action sounding in ordinary negligence. In making such determination, we look to whether the injury resulted from the application of "specialized knowledge, labor, or skill," or from actions which were primarily "physical or manual." *Setty* at 608, 503 S.E.2d at 674. Prior case law is instructive. For example, in *Setty*, the quadriplegic plaintiff was injured when he was moved from an examination table to a wheelchair. *Id.* This Court held that the alleged negligent conduct was "predominately a physical or manual activity" which did not implicate the defendant's professional services but fell "squarely within the parameters of ordinary negligence." *Id.* Similarly, in *Norris v. Rowan Memorial Hospital*, this Court concluded that the hospital employees' failure to raise the rails of a bed or instruct the patient to ask for assistance in getting out of bed (which resulted in the patient falling

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and breaking her hip) stemmed from ordinary negligence because the “alleged breach of duty did not involve the rendering or failure to render professional nursing or medical services requiring special skills.” 21 N.C. App. 623, 626, 205 S.E.2d 345, 348 (1974). Finally, in *Taylor v. Vencor, Inc.*, the administrator of a patient’s estate brought a wrongful death action against a nursing home, alleging that the nursing home failed “through inadequate staffing and other negligent behavior, to provide adequate observation and supervision” of a patient who died after lighting her nightgown on fire when attempting to light a cigarette. 136 N.C. App. 528, 529, 525 S.E.2d 201, 202 (2000). This Court held that “the observance and supervision of the plaintiff, when she smoked in the designated smoking area, did not constitute an occupation involving specialized knowledge or skill.” *Id.* at 530, 525 S.E.2d at 203. We additionally remarked: “Preventing a patient from dropping a match or a lighted cigarette upon themselves, while in a designated smoking room, does not involve matters of medical science.” *Id.*

In the instant case, plaintiff alleges that defendant breached its duty (1) to exercise due care with respect to providing reasonably safe living quarters for its residents, (2) to warn residents of unsafe conditions, and (3) to supervise patients when:

- a) Defendant placed the aforesaid instrumentality in such a position as to be unreasonably unstable so as to constitute a hazard to those in close proximity hereto, such as plaintiff’s decedent;
- b) Defendant failed to properly supervise the plaintiff’s decedent’s activities once defendant installed use of the instrumentality to provide intravenous fluids to plaintiff’s decedent; AND
- c) Defendant failed to warn plaintiff’s decedent of the presence of the instrumentality and to warn plaintiff’s decedent of the instability of the equipment.

In essence, plaintiff alleges that defendant, through its agents, failed to safely position the I.V. apparatus in the decedent’s room and failed to warn the decedent accordingly. Based on prevailing case law, we hold that defendant’s acts or failure to act clearly involved the exercise of manual dexterity as opposed to the rendering of any specialized knowledge or skill. *See, e.g., Norris*, 21 N.C. App. at 626, 205 S.E.2d at 348. Accordingly, we hold that the claims asserted in plaintiff’s complaint sound in ordinary negligence rather than medical malpractice.

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Given that plaintiff's claims sound in ordinary negligence, her action is subject to the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(16) (2013) (providing that an action for personal injury not governed by the statute of repose, N.C. Gen. Stat. § 1-15(c), shall be brought within three years of the date upon which bodily harm to the claimant "becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs"). Here, the decedent was injured on 13 September 2008. Plaintiff filed her initial complaint within the three-year period on 5 October 2010. She subsequently voluntarily dismissed the action without prejudice pursuant to Rule 41. Under Rule 41, a new action based on the same claim may be commenced within one year after such dismissal, and "the refiled case will relate back to the original filing for purposes of tolling the statute of limitations." *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 283, 648 S.E.2d 261, 264-65 (2007). Because plaintiff voluntarily dismissed her complaint on 18 January 2012 and timely refiled it on 18 January 2013, her complaint is not time barred. Further, given that plaintiff's claims sounded in ordinary negligence rather than medical malpractice, the four-year statute of repose provided for in N.C. Gen. Stat. § 1-15(c) was inapplicable. Plaintiff's claims are not barred by the statute of limitations or the statute of repose. Accordingly, the trial court erred in dismissing plaintiff's action with prejudice on grounds that plaintiff violated the statute of repose.

Reversed and remanded.

Judges McCULLOUGH and DAVIS concur.

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[234 N.C. App. 336 (2014)]

HIGH ROCK LAKE PARTNERS, LLC, A NORTH CAROLINA LIMITED LIABILITY
COMPANY, AND JOHN DOLVEN, PETITIONERS-APPELLANTS

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT-APPELLEE

No. COA13-1010

Filed 17 June 2014

**Appeal and Error—preservation of issues—failure to argue—
abuse of discretion—attorney fees**

Although petitioners contended that the trial court erred by denying their motion for attorney fees, petitioners failed to argue on appeal that the trial court abused its discretion, and thus, any such argument was abandoned. Further, because petitioners' second and third arguments relied upon the success of their first, those arguments also failed.

Appeal by Petitioners from order entered 22 May 2013 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 4 March 2014.

Van Winkle, Buck, Wall, Starnes and David, P.A., by Craig D. Justus, for Petitioners-Appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General James M. Stanley, Jr., Assistant Attorney General Scott K. Beaver, and Assistant Attorney General Jennifer S. Watson, for Respondent-Appellee.

McGEE, Judge.

High Rock Lake Partners, LLC (“High Rock”) purchased approximately 190 acres in Davidson County (“the property”) in August 2005. High Rock intended to develop the property into a sixty-lot residential subdivision. High Rock purchased the property for \$5,200,000.00. John Dolven, M.D. (“Dolven”) provided \$3,600,000.00 of the purchase price through a secured loan. High Rock and Dolven are petitioners (“Petitioners”) in this matter. In December 2005, the Davidson County Board of Commissioners approved the preliminary plat, based on High Rock’s “meeting all the County requirements for subdivision approval.”

The only way to access the property was by way of State Road 1135 (“SR 1135”), which was maintained by Respondent North Carolina

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Department of Transportation (“DOT”), as part of the State Highway System. As part of High Rock’s initial development phase, it sought to extend SR 1135 — which dead-ended on the property — in order to provide a driveway connection into the planned subdivision.

In October 2005, High Rock applied to DOT for a permit to construct a driveway. The proposed driveway connection point was located on SR 1135, approximately one-quarter mile from a railroad crossing (“the railroad crossing”). Due to the location of a railroad yard near the railroad crossing, idling locomotives sometimes blocked the crossing.

In a letter dated 12 December 2005, Chris Corriher, DOT District Engineer for Davidson County, denied High Rock’s application. High Rock timely appealed this denial to DOT Division Engineer, Pat Ivey (“Ivey”). Ivey granted High Rock’s permit application, with the conditions that High Rock widen the railroad crossing and secure the necessary permissions from the railroad companies to do so. High Rock appealed DOT’s conditions to the DOT Driveway Permit Appeals Committee (“DOT Appeals Committee”). The DOT Appeals Committee upheld the conditions set out by Ivey. High Rock filed a Petition for Judicial Review in Superior Court, Mecklenburg County, on 17 September 2007.

Dolven acquired the property through a foreclosure proceeding on 10 December 2007. High Rock assigned its rights in development approvals, including the driveway permit, to Dolven. High Rock sought to join Dolven as a party to the case pending in Mecklenburg County Superior Court. On 26 August 2008, the trial court ruled, *inter alia*, that Dolven could not be added as a party. The trial court also ruled that DOT’s actions regarding the driveway permit were statutorily authorized but that the conditions related to High Rock’s obtaining railroad consent were unconstitutional.

Dolven appealed and, on 18 May 2010, this Court vacated the trial court’s 26 August 2008 ruling and remanded the case for a new hearing on the merits, with Dolven joined as a party. *High Rock Lake Partners, LLC v. N.C. Dep’t of Transp.*, 204 N.C. App. 55, 693 S.E.2d 361 (2010) (“*High Rock I*”). The trial court, as directed by this Court, joined Dolven by order entered 1 November 2010 and, in judgment entered 24 November 2010, ruled that DOT had not acted (1) in excess of its statutory authority, (2) arbitrarily and capriciously, or (3) in violation of either the United States or North Carolina constitutions. Petitioners appealed, and this Court affirmed the judgment of the trial court. *High Rock Lake Partners, LLC v. North Carolina DOT*, __ N.C. App. __, 720 S.E.2d 706 (2011) (“*High Rock II*”). Our Supreme Court granted discretionary review and

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reversed *High Rock II*, determining that the conditions placed on the driveway permit were not authorized under the plain language of N.C. Gen. Stat. § 136–18(29), and holding that DOT had exceeded its statutory authority by imposing those conditions. *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 323, 735 S.E.2d 300, 306 (2012) (“*High Rock III*”). A more extensive factual and procedural history may be found in these prior opinions.

Petitioners filed a motion for attorney’s fees pursuant to N.C. Gen. Stat. § 6-19.1 on 14 January 2013. The trial court heard Petitioners’ motion on 8 April 2013 and, in an order entered 22 May 2013, denied Petitioners’ motion. Petitioners appeal.

Petitioners argue that the trial court erred in denying their motion for attorney’s fees based upon the trial court’s conclusion that “DOT’s positions in this case from the initial denial of the driveway permit through to the Supreme Court’s decision in *High Rock [III]* were substantially justified under G.S. § 6-19.1.” Petitioners further argue that, because of this alleged error, this Court should instruct the trial court to award Petitioners their attorney’s fees. We disagree.

N.C. Gen. Stat. § 6-19.1 states in relevant part:

(a) In any civil action, . . . unless the prevailing party is the State, *the court may, in its discretion*, allow the prevailing party to recover reasonable attorney’s fees, including attorney’s fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney’s fees unjust.

N.C. Gen. Stat. § 6-19.1 (2013) (emphasis added). By the clear language of the statute, once the trial court makes the appropriate findings required in subsections (1) and (2) of N.C.G.S. § 6-19.1(a), its decision on whether or not to award attorney’s fees is discretionary.

It is well settled that “[a]ppellate review of matters left to the discretion of the trial court is limited to a

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determination of whether there was a clear abuse of discretion.” Furthermore, “[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.”

Smith v. Beaufort County Hosp. Ass’n., 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000) (citations omitted). In *Crowell Constructors, Inc. v. State ex rel. Cobey*, our Supreme Court has recognized the prerequisites required before a trial court can exercise its discretion to award attorney’s fees pursuant to N.C.G.S. § 6-19.1, as follows:

Thus, *in order for the trial court to exercise its discretion* and award reasonable attorney’s fees to a party contesting State action in one of the prescribed ways, the prevailing party must not be the State, the trial court must find the State agency acted “without substantial justification” in pressing its claim and the trial court must find no special circumstances exist which make an award of attorney’s fees unjust.

Crowell Constructors, Inc. v. State ex rel Cobey, 342 N.C. 838, 843, 467 S.E.2d 675, 678 (1996) (emphasis added). Stated another way, if the trial court determines that: (1) a State agency acted “without substantial justification,” and (2) no special circumstances exist which make an award of attorney’s fees unjust, then the trial court’s discretionary power to award attorney’s fees manifests. The trial court is not, however, *required* to award attorney’s fees subsequent to making these determinations, and its discretionary decision to award or not to award attorney’s fees may only be overturned upon a showing that its decision constituted an abuse of its discretion. However, if the trial court determines that the State agency did not act “without substantial justification,” or that some special circumstances do exist which make an award of attorney’s fees unjust, then the trial court lacks discretion, and *cannot* award attorney’s fees.

The trial court, in its 22 May 2013 order, acknowledged that it only had discretion to award attorney’s fees pursuant to N.C.G.S. § 6-19.1 if it found that DOT acted without substantial justification and no special circumstances existed that made the award of attorney’s fees unjust. The trial court found as fact that DOT did not argue the “special circumstances” prong of N.C.G.S. § 6-19.1. The trial court then concluded that

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DOT “was justified [in its handling of this action] to a degree that could satisfy a reasonable person[.]” It further concluded, “in its discretion, that attorney’s fees should not be awarded in this matter.”

In this instance, even assuming, *arguendo*, the trial court erred in concluding that DOT acted with substantial justification, the trial court also denied the award of attorney’s fees in its discretion. Because the discretion to award attorney’s fees could only be present absent a conclusion that DOT acted with substantial justification, the trial court’s conclusion that, “in its discretion, . . . attorney’s fees should not be awarded in this matter[.]” constitutes an alternative basis for the denial of Petitioners’ motion.

The standard of review for the trial court’s decision not to award attorney’s fees on this basis is abuse of discretion, and it is Petitioners’ duty to prove abuse of discretion in order to prevail on appeal. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 610, 617 S.E.2d 40, 50 (2005) (citations omitted) (“To show an abuse of discretion and reverse the trial court’s order . . . appellant[] has the burden to show the trial court’s rulings are “‘manifestly unsupported by reason,’” or “‘could not be the product of a reasoned decision[.]’”). Petitioners have not argued that the trial court abused its discretion by refusing to award them attorney’s fees.

It appears Petitioners believe that the trial court was *required* to award them attorney’s fees if DOT acted without substantial justification in pressing its claim and no special circumstances existed which made an award of attorney’s fees unjust. Petitioners cite *Crowell Constructors* for the proposition that DOT had to prove that its pursuit of this action was substantially justified; otherwise, according to Petitioners, the trial court was required to order DOT to pay Petitioners’ attorney’s fees. In support of their argument, Petitioners cite to a portion of *Crowell Constructors* in which our Supreme Court looked to similar language in a federal statute to define the term “substantial justification.” *Crowell Constructors*, 342 N.C. at 843-44, 467 S.E.2d at 679. However, the federal statute differs from N.C.G.S. § 6-19.1 in a major respect. The federal statute states:

“Except as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”

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Crowell Constructors, 342 N.C. at 843, 467 S.E.2d at 679 (emphasis changed), (quoting 28 U.S.C. § 2412(d)(1)(A) (1994)). The federal statute makes the award of attorney's fees mandatory absent the proper showing of substantial justification or special circumstances, whereas N.C.G.S. § 6-19.1 grants the trial court discretion in making an award of attorney's fees. N.C.G.S. § 6-19.1(a) (“[T]he court may, in its discretion, allow the prevailing party to recover reasonable attorney’s fees[.]”).

In *Crowell Constructors*, unlike in the present case, the trial court had already ordered the State agency to pay attorney's fees to the prevailing party. *Crowell Constructors*, 342 N.C. at 841, 467 S.E.2d at 678. Therefore, if the State agency could show on appeal that it had acted with substantial justification in pressing its claim, it would show that the trial court had lacked the discretion to impose attorney's fees and had therefore erred. Our Supreme Court held that it could not say that the State agency was “without substantial justification.” *Id.* at 846, 467 S.E.2d at 681. Therefore, the award of attorney's fees had been improper. *Id.* Another opinion cited by Petitioners, *Daily Express, Inc. v. Beatty*, 202 N.C. App. 441, 688 S.E.2d 791 (2010), is similarly inapposite because it also dealt with an appeal where the trial court awarded attorney's fees, not an appeal from the trial court's *refusal* to award attorney's fees. *Id.* at 456, 688 S.E.2d at 802 (“[W]e conclude that [r]espondent's decision to proceed against [p]etitioner was ‘substantially justified’ and that the trial court erred by reaching a contrary conclusion in awarding attorney's fees to [p]etitioner pursuant to N.C. Gen. Stat. § 6–19.1”[.]).

In the present matter, even assuming *arguendo* DOT lacked substantial justification in pressing its claims, Petitioners would have had to argue on appeal and show that the trial court abused its discretion in denying Petitioners' motion for attorney's fees. *Bourlon*, 172 N.C. App. at 610, 617 S.E.2d at 50; *see also Willen v. Hewson*, 174 N.C. App. 714, 722, 622 S.E.2d 187, 193 (2005). Because Petitioners have not argued on appeal that the trial court abused its discretion in failing to award them attorney's fees pursuant to N.C.G.S. § 6–19.1, any such argument is abandoned. N.C.R. App. P. 28(b)(6) (“Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.”). Petitioners' argument is dismissed.

Because Petitioners' second and third arguments rely upon the success of their first, those arguments also fail. The 22 May 2013 order denying attorney's fees is affirmed.

Affirmed.

Judges STEELMAN and ERVIN concur.

IN RE J.D.

[234 N.C. App. 342 (2014)]

IN RE J.D., A MINOR CHILD

No. COA14-145

Filed 17 June 2014

**Termination of Parental Rights—subject matter jurisdiction
—venue**

The trial court lacked subject matter jurisdiction to terminate respondent’s parental rights to his child. The trial court erred in concluding that the Indiana court relinquished jurisdiction to North Carolina’s courts by entering an order in Indiana dismissing the paternal grandparents’ motion for visitation rights. Furthermore, nothing in the record evidenced a determination by the Indiana court that it no longer had exclusive, continuing jurisdiction over the minor child’s case or that a North Carolina court would be a more convenient forum.

Appeal by respondent from order entered 25 November 2013 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 29 May 2014.

Horack, Talley, Pharr & Lowndes, PA, by Elizabeth Johnstone James, for petitioner-appellee.

Rebekah W. Davis for respondent-appellant.

DAVIS, Judge.

B.D. (“Respondent”) appeals from an order terminating his parental rights to his son, J.D. (“Josh”)¹, who was born in August 2006 in Indianapolis, Indiana. On appeal, Respondent argues that the trial court lacked jurisdiction to grant the petition to terminate Respondent’s parental rights. After careful review, we vacate the trial court’s order and remand for entry of an order dismissing the petition.

Factual Background

K.P. (“Petitioner”) is Josh’s mother. At the time of Josh’s birth, Petitioner and Respondent lived together in Indiana. They separated approximately two months after Josh was born. On or about

1. The pseudonym “Josh” is used throughout this opinion to protect the privacy of the minor child and for ease of reading. N.C.R. App. P. 3.1(b).

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17 December 2008, Respondent filed an action (“the Indiana Action”) in the Circuit Court of Marion County, Indiana (“the Indiana court”) seeking custody of Josh. On or about 8 January 2009, the Indiana court entered a consent order establishing paternity, custody, child support, and visitation. In 2011, Petitioner moved with Josh to North Carolina, where she and Josh continue to reside.

On 2 August 2011, the Indiana court entered an order modifying its child custody order to permit visitation by Respondent. On 18 November 2011, the Indiana court suspended Respondent’s visitation privileges. On 2 December 2011, Josh’s paternal grandparents — who live in Indiana — filed a motion to intervene for the purpose of obtaining visitation rights regarding Josh. The Indiana court dismissed the grandparents’ motion to intervene on 14 December 2011.

On 18 July 2012, Petitioner filed a petition in Mecklenburg County District Court seeking to terminate Respondent’s parental rights to Josh. On 13 September 2012, in conjunction with his answer to the petition, Respondent filed a motion to dismiss on the grounds of lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted.

On 7 November 2012, Respondent filed a motion for a protective order pursuant to Rule 26(c) of the North Carolina Rules of Civil Procedure seeking to be excused from answering a set of interrogatories propounded by Petitioner until the trial court’s jurisdiction was established. On 18 March 2013, Petitioner filed a motion to compel Respondent to respond to the interrogatories and also to her request for production of documents. On 4 June 2013, a consent order was entered in which the parties agreed to continue the pretrial conference until 26 June 2013. Respondent also agreed in this order to respond to Petitioner’s interrogatories by 21 June 2013. The order stated that if he failed to respond to the interrogatories by this deadline, Petitioner would be “entitled to request that discovery sanctions be levied against Respondent” at the pretrial conference.

Following the pretrial conference, the trial court issued an order on 15 July 2013 in which it concluded it had jurisdiction over both the parties and the subject matter. In addition, the court sanctioned Respondent for failing to respond to Petitioner’s first set of interrogatories by prohibiting him (1) “from putting on evidence regarding any of the issues contained in Petitioner’s First Set of Interrogatories”; and (2) from “us[ing] in his defense any information that should have (or could have) been responsive to Petitioner’s First Set of Interrogatories”

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The trial court conducted adjudication and disposition hearings in connection with Petitioner's petition to terminate Respondent's parental rights on 6 November 2013 and filed an order on 25 November 2013 terminating his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) and (7). Respondent filed a timely notice of appeal.

Analysis

Respondent contends that the order terminating his parental rights must be vacated because the Mecklenburg County District Court lacked jurisdiction over the subject matter and over Respondent's person in that (1) the child custody action regarding Josh originated in Indiana and the Indiana court has retained subject matter jurisdiction; and (2) Respondent is not a resident of North Carolina and had insufficient minimum contacts with this State to permit the trial court's exercise of personal jurisdiction over him. Petitioner argues Respondent waived any challenge to jurisdiction by not appealing the 15 July 2013 order in which the court concluded it had both subject matter and personal jurisdiction. Petitioner further argues that even if the jurisdictional arguments were not waived, the trial court did, in fact, possess subject matter and personal jurisdiction over Respondent.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). With regard to "matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). Whether a court has jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

The jurisdictional statute that governs actions to terminate parental rights is N.C. Gen. Stat. § 7B-1101, which provides as follows:

The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or

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motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. *The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a non-resident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.*

N.C. Gen. Stat. § 7B-1101 (2013) (emphasis added).

The above-referenced statutes listed in N.C. Gen. Stat. § 7B-1101 are all provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), which defines a “child-custody determination” as “a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child.” N.C. Gen. Stat. § 50A-102(3) (2013). The jurisdictional requirements of the UCCJEA apply to proceedings for the termination of parental rights. *In re N.R.M.*, 165 N.C. App. 294, 298, 598 S.E.2d 147, 149 (2004).

Because this action sought the termination of nonresident Respondent’s parental rights, N.C. Gen. Stat. § 50A-204 — which confers upon a court of this State temporary emergency jurisdiction if the child is within this State and has been abandoned or the exercise of jurisdiction is necessary to protect the child from mistreatment or abuse — could not provide the trial court with subject matter jurisdiction in this case. *See* N.C. Gen. Stat. § 7B-1101 (“[B]efore exercising jurisdiction . . . regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, *without regard to G.S. 50A-204 . . .*” (emphasis added)).

Thus, pursuant to N.C. Gen. Stat. § 7B-1101 and the UCCJEA, we must determine whether the trial court possessed subject matter jurisdiction under N.C. Gen. Stat. §§ 50A-201 or -203.

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N.C. Gen. Stat. § 50A-201 provides:

(a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an *initial* child-custody determination only if:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S.50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

N.C. Gen. Stat. § 50A-201 (2013) (emphasis added).

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In the present case, because the initial child custody determination was made by the Indiana court, N.C. Gen. Stat. § 50A-201 is inapplicable. *See N.R.M.*, 165 N.C. App. at 298, 598 S.E.2d at 150 (concluding that N.C. Gen. Stat. § 50A-201 could not confer subject matter jurisdiction upon North Carolina court because initial custody determination had been made in Arkansas).

Thus, the only basis by which the trial court could have conceivably obtained subject matter jurisdiction was through N.C. Gen. Stat. § 50A-203. N.C. Gen. Stat. § 50A-203 provides that a court of this State may not modify a child custody determination of a court of another state

unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and:

- (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
- (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203.

Therefore, either of two events would have had to occur in order for the trial court to have actually acquired subject matter jurisdiction in this action based on N.C. Gen. Stat. § 50A-203: (1) a determination by the Indiana court that it no longer had exclusive, continuing jurisdiction or that a North Carolina court would be a more convenient forum; or (2) a determination by either court that neither Josh nor Petitioner nor Respondent presently lived in Indiana. *N.R.M.*, 165 N.C. App. at 300-01, 598 S.E.2d at 150-51.

The latter prong clearly does not provide subject matter jurisdiction in this case because Respondent continues to reside in Indiana. *See In re J.W.S.*, 194 N.C. App. 439, 448, 669 S.E.2d 850, 856 (2008) (explaining that New York did not lose continuing jurisdiction over custody of child for purposes of N.C. Gen. Stat. § 50A-203(2) because juvenile's mother continued to reside there).

Consequently, the first prong of N.C. Gen. Stat. § 50A-203 is the only possible basis for the existence of jurisdiction in North Carolina. In its

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order terminating Respondent's parental rights, the trial court concluded that — for purposes of N.C. Gen. Stat. § 50A-203(1) — the Indiana court had declined jurisdiction over the custody of Josh by dismissing the motion to intervene filed by Josh's paternal grandparents. We disagree.

The order of the Indiana court dismissing the grandparents' motion consisted of three paragraphs. The first paragraph identified the motion before the court and the parties present at the hearing. The second and third paragraphs read as follows:

The Court having considered the matters before it and after argument finds that Mother's Motion to Dismiss must be Granted. Pursuant to I.C. § 31-17-5-4 et seq., a Petition for Grandparent Visitation must be filed in a circuit, superior or probate court of the county in which the child resides for all cases filed pursuant to I.C. § 31-17-5-1(a)(3). It is undisputed that the minor child resides in Mecklenburg County, North Carolina, not Marion County, Indiana. Therefore, Marion County, Indiana is not the proper venue for this matter.

Intervenor's Request for Grandparent Visitation is hereby dismissed without prejudice.

The order dismissing the grandparents' motion to intervene was based upon Indiana's Grandparent Visitation Act, I.C. 31-17-5-1 *et seq.*, which provides for grandparents to seek visitation rights in certain limited situations. The Indiana Court of Appeals has stated that "the Grandparent Visitation Act contemplates only occasional, temporary visitation that does not substantially infringe on a parent's fundamental right to control the upbringing, education, and religious training of their children." *Hoeing v. Williams*, 880 N.E.2d 1217, 1221 (Ind. Ct. App. 2008) (citation and quotation marks omitted). North Carolina does not have any statutory provision for an independent action for grandparents' visitation analogous to Indiana's statute, although a grandparent can be granted visitation in the context of a custody case between the parents in some circumstances. *See* N.C. Gen. Stat. § 50-13.2(b1).

It is clear that the order dismissing the grandparents' motion to intervene and request for grandparent visitation was based solely upon Indiana's venue statute, which requires that an action for grandparent visitation be filed in the county in which the child resides. *See* I.C. § 31-17-5-4 ("A grandparent seeking visitation rights shall file a petition requesting reasonable visitation rights . . . in a circuit, superior or probate court of the county in which the child resides . . ."). Specifically, the

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Indiana court concluded that “Marion County, Indiana is not the proper venue for this matter.” Venue is designated by statute, and “[i]t has been well settled in this State for many years that venue is not jurisdictional” *Shaw v. Stiles*, 13 N.C. App. 173, 176, 185 S.E.2d 268, 269 (1971). In addition, the Indiana order simply dismissed the grandparents’ motion “without prejudice,” without any mention of relinquishing jurisdiction of the custody matter.

Accordingly, we hold that the trial court erred in concluding that the Indiana court relinquished jurisdiction to North Carolina’s courts by entering the order in the Indiana Action dismissing the paternal grandparents’ motion for visitation rights. Nothing in the record evidences a determination by the Indiana court that it no longer had exclusive, continuing jurisdiction over Josh’s case or that a North Carolina court would be a more convenient forum. Because the trial court lacked subject matter jurisdiction, we vacate the trial court’s order terminating Respondent’s parental rights and remand for entry of an order dismissing the petition. See *In re J.A.P.*, ___ N.C. App. ___, ___, 721 S.E.2d 253, 254-55 (2012) (vacating termination of parental rights order and remanding for entry of order dismissing petition in light of absence of evidence that New Jersey had determined that it “no longer ha[d] exclusive, continuing jurisdiction or that a court of this State [North Carolina] would be a more convenient forum” (internal quotation marks omitted)).²

Conclusion

For the reasons stated above, we vacate the trial court’s order terminating Respondent’s parental rights and remand for entry of an order dismissing the petition.

VACATED AND REMANDED.

Judges CALABRIA and STROUD concur.

2. Because we hold that the trial court did not possess subject matter jurisdiction, we need not address Respondent’s argument that the court also lacked personal jurisdiction over him.

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[234 N.C. App. 350 (2014)]

IN THE MATTER OF M.J.G.

No. COA13-1293

Filed 17 June 2014

1. Juveniles—delinquency—misdemeanor assault

The trial court did not err by failing to find that the juvenile was delinquent of the offense of misdemeanor assault beyond a reasonable doubt. The court relied on the petition that sufficiently alleged the juvenile committed simple assault by forcefully hitting the victim in her shoulder, breast, and chest area with his shoulder, causing the victim to move back a few steps.

2. Evidence—testimony—juvenile’s defiant expression—relevancy

The trial court did not err by allowing a witness to characterize a juvenile’s expression as “defiant” and alternatively, by denying his motion to dismiss the petition for misdemeanor assault. Because this testimony stemmed from the witness’s personal experience combined with her observation of the juvenile, it was admissible to shed light upon the circumstances surrounding the alleged incident, and thus, was relevant and admissible. Further, there was sufficient evidence to determine that the juvenile’s actions were intentional.

3. Juveniles—delinquency—disorderly conduct

The trial court did not err by denying a juvenile’s motion to dismiss a petition for disorderly conduct. The facts of the case, viewed in the light most favorable to the State, demonstrated that the juvenile’s conduct caused a substantial interference with, disruption of, and confusion of the operation of the school.

4. Juveniles—disposition hearing—terms—failure to cite authority—harmless error—failure to object

The trial court did not err by holding an alleged sham disposition hearing and allegedly violating the statutory mandate to allow the juvenile’s parents to present evidence. The juvenile failed to cite to any authority to support his assumption of a sham hearing. Assuming *arguendo* that the trial court decided the terms of his disposition prior to allowing the juvenile’s mother to be heard, any error was harmless based on the fact that the mother did not object to the condition of attending the family classes but effectively agreed with the trial court.

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[234 N.C. App. 350 (2014)]

Appeal by juvenile from adjudication and disposition orders entered 10 July 2013 and 12 July 2013, respectively, by Judge Sherry D. Prince in Brunswick County District Court. Heard in the Court of Appeals 5 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Susannah P. Holloway, for the State.

Mark Hayes for juvenile-appellant.

McCULLOUGH, Judge.

The juvenile appeals from an adjudication order finding him delinquent of misdemeanor assault and disorderly conduct at school and from a level one disposition order. For the reasons stated herein, we affirm the orders of the trial court.

I. Background

On 20 May 2013, two juvenile petitions were filed against M.J.G. (“the juvenile”) in Brunswick County District Court alleging offenses of misdemeanor assault in violation of N.C. Gen. Stat. § 14-33(a) and disorderly conduct in violation of N.C. Gen. Stat. § 14-288.4(a)(6).

An adjudication hearing was held on 25 June 2013. Evidence presented at the adjudication hearing indicated that on 26 April 2013, a fundraiser volleyball game was being held in the gymnasium at Waccamaw Elementary School (“Waccamaw”) in Brunswick County, North Carolina. Children from the fifth, sixth, seventh, and eighth grades were gathered in the gymnasium, watching the game. The juvenile was a sixth grade student at Waccamaw.

Emily Long, a teacher at Waccamaw, testified that she saw two boys in the bleachers “getting ready to fight” by having their “fists clenched.” As Ms. Long was approaching the two boys, they were removed from the gymnasium by two other teachers, including Ms. Meagan Potts. Ms. Long testified that prior to the two boys being escorted out, she had seen the juvenile sitting next to the boys, waving at Ms. Potts and “telling her no, don’t stop it, go away.” Ms. Long told the juvenile she wanted to talk to him about “not waving off a fight,” not “waving the teachers off[,]” and requested that he come off the bleachers to go outside with her. Ms. Long was on the floor of the gymnasium and the juvenile was on the second or third bleacher. Ms. Long testified as follows:

[a]t that point [the juvenile] got angry, did not want to come with me. I probably repeated four or five times for

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him to come on. He stormed off the bleachers and Ms. [Susan Wood] had come up behind me and he stormed right over her, ran right over her, pushed out the gym door. I walked behind him to go ahead and talk with him and kept asking him to stop and let me talk to him.

The juvenile walked down a hallway and the school resource office, Deputy Christopher Barbour, approached the juvenile and Ms. Long. The juvenile began shouting, “I’m tired of this f’ing school, these teachers lying on me, they’re always lying on me.” The juvenile put his finger less than an inch away from Long’s face, “postured up chest to chest” and said “[e]specially you you mother-f***ing b****[.]” Thereafter, the juvenile backed Ms. Potts against a wall and “did the exact same thing to her.”

Susan Wood, an emergency medical technician with Horry County Fire Rescue, testified that she was in the Waccamaw gymnasium on 26 April 2013. She was the parent of two children attending Waccamaw and decided to watch the game. After seeing a commotion, Wood walked over to Ms. Long’s location to see if there was a medical issue that needed assistance. Wood testified to the following:

When I got to [Ms. Long], she was asking [the juvenile] to come out of the stands. Once I realized that it wasn’t a medical issue, he was doing this at her – shut up, shut your mouth, go away, we don’t need you, go away, shut up, go away. And I – I was shocked. . . . I decided to stand and observe.

[The juvenile] finally stood up after, you know, doing this motion at her, chopping at her face, and telling her to go away, get out of here, we don’t need you. Stood up — there was plenty of room between Ms. Long and myself on either side and he was two or three bleachers up and came down the bleachers and body checked me. And the look on his face was very defiant, almost ha, ha.

. . . .

I ended up taking three or four steps back to keep from falling.

Deputy Christopher Barbour, the Waccamaw school resource officer, testified that he was standing in a hallway adjacent to the gymnasium when he spoke with Ms. Long. As Ms. Long was attempting to explain the situation to Deputy Barber, the juvenile “turned around

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and [the juvenile] started walking back towards us and he was, you know, flaring his arms no, stop, don't, quit lying, you know, things of that nature." Deputy Barbour told the juvenile to leave the building but the juvenile "jumped up, stomped his feet, and then he started cussing." Deputy Barbour further testified to the following:

I originally thought he was going to go around me to go out the door because that was the direction in which he was headed. But he just moseyed on right around me and that's when he got into Ms. Long's face, began cursing her, cursing Ms. Potts and [another teacher.]

Deputy Barbour "had to physically put [his] hands on [the juvenile] to remove him from the hallway[.]" Once the juvenile was outside of the building, he continued to "curse and holler and scream." The juvenile was escorted to the main office of the school.

On 10 July 2013, the trial court entered a "Juvenile Adjudication Order" finding the juvenile delinquent of both offenses. Following a disposition hearing held on 10 July 2013, the juvenile received a Level I disposition. The juvenile was ordered to be placed on probation for 12 months.

The juvenile appeals.

II. Discussion

On appeal, the juvenile argues that the trial court erred by (A) failing to find that he was delinquent of the offense of misdemeanor assault beyond a reasonable doubt; (B) allowing Ms. Wood to characterize his expression as "defiant" and alternatively, to deny his motion to dismiss the petition for misdemeanor assault; (C) denying his motion to dismiss the petition for disorderly conduct; and (D) holding a sham disposition hearing and violating the statutory mandate to allow the juvenile's parents to present evidence.

A. Standard of Proof

[1] First, the juvenile argues that the trial court erred by failing to find in its adjudication order, that he was delinquent of the offense of misdemeanor assault beyond a reasonable doubt. We disagree.

It is well established that

[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt. Further, [i]f the court finds that the allegations in the petition have

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been proved . . . , the court *shall* so state. . . . [I]t is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt.

In re D.K., 200 N.C. App. 785, 788, 684 S.E.2d 522, 525 (2009) (citations and quotation marks omitted).

Specifically, the juvenile argues that the adjudication order does not include the conclusion of law that he committed assault beyond a reasonable doubt and that the adjudication order does not include findings of fact inferring such a conclusion. The juvenile relies on *In re J.V.J.*, 209 N.C. App. 737, 707 S.E.2d 636 (2011), for his contentions. In *J.V.J.*, the juvenile argued that the trial court failed to make sufficient findings of fact to support the conclusion that the juvenile had committed the offense of assault on a government officer, and our Court agreed. *Id.* at 739, 707 S.E.2d at 637. Our Court noted that with respect to an adjudication order in the juvenile delinquency context, N.C. Gen. Stat. § 7B-2411 provided that

[i]f the court finds that the allegations in the petition have been proved [beyond a reasonable doubt], the court shall so state in a written order of adjudication, *which shall include, but not be limited to*, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

Id. at 739-40, 707 S.E.2d at 637 (emphasis in original). In *J.V.J.*, the trial court failed to address any of the allegations set out in the juvenile petition. It even failed to “summarily aver that ‘the allegations in the petition have been proved[.]’”. *Id.* at 740, 707 S.E.2d at 638. Accordingly, our Court remanded the case to the trial court to make the statutorily mandated findings of fact as set out in N.C. Gen. Stat. § 7B-2411 (2009). *Id.* at 741, 707 S.E.2d at 638.

In the case *sub judice*, however, the facts are readily distinguishable. Our review indicates that the 10 July 2013 “Juvenile Adjudication Order” entered by the trial court states that the “petition(s) before the court” included “misdemeanor assault.” It also contains a blank space where the trial court is to state findings of fact which “have been proven beyond a reasonable doubt.” In this blank space, the trial court indicated “please see attached ‘Adjudication Findings of Fact.’”

The attached “Adjudication Findings of Fact” included the following findings of fact:

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That on or about April 26, 2013, the Juvenile was a spectator of a fundraiser volleyball game inside the gymnasium of Waccamaw School in Ash, North Carolina. Waccamaw School is a public educational institution in Brunswick County. That during the volleyball game, which took place at the end of a half-day of school, a disturbance between two other juveniles began. After the disturbance, Ms. Emily Long, a teacher at Waccamaw School, asked the Juvenile to come down from the bleachers and leave the gymnasium as it appeared to her that he was instigating the potential fight between the other juveniles. The Juvenile at first resisted, but then came off the bleachers. While he was coming off the bleachers, he came into contact with Ms. Susan Wood, an EMT and parent of another student that was watching the volleyball game, by hitting Ms. Wood in her shoulder and chest area with his shoulder as he walked by her, causing Ms. Wood to move backwards.

That after the Juvenile left the gymnasium he went to an adjacent hallway to wait for Ms. Long. Classes were not in session in this hallway. The Juvenile, Ms. Long, Ms. Wood, two other teachers, one of the students involved in the original disturbance, two [vendors], and possibly other students were present in the hallway at this time. Deputy Chris Barbour, the School Resource Officer, was present shortly after the Juvenile entered the hallway. A confrontation occurred whereby the Juvenile became angry, erratic, and unresponsive to the requests of Dept. Barbour. The Juvenile began yelling at and directing profanity at several teachers, refused to leave the area when instructed to by Dept. Barbour, and only left the hallway after being [forced] to by Dept. Barbour. The students in the gymnasium could not hear this altercation in the hallway, but this conduct did disturb the peace, order, or discipline at Waccamaw School.

The “Juvenile Adjudication Order” also states that, “[t]he Court concludes as a matter of law, that in regard to the allegations in the petition(s) before the Court” the juvenile is delinquent. Here, the petition for misdemeanor assault alleged that juvenile committed simple assault by “forcefully hitting the victim in her shoulder, breast, and chest area with his shoulder, causing the victim to move back a few steps.”

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Based on the foregoing, we reject the juvenile's arguments that the trial court failed to find that he had committed misdemeanor assault beyond a reasonable doubt and affirm the adjudication order of the trial court.

B. Ms. Wood's Testimony and the Juvenile's Motion to Dismiss

[2] In his second argument, the juvenile asserts that the trial court erroneously allowed Ms. Wood to testify that his expression was "defiant." Alternatively, the juvenile argues that the trial court erred by denying his motion to dismiss the petition for assault based on insufficiency of the evidence.

At the juvenile's adjudication hearing, Ms. Wood testified to the following:

[The juvenile] finally stood up after, you know, doing this motion at [Ms. Long], chopping at her face, and telling her to go away, get out of here, we don't need you. Stood up — there was plenty of room between Ms. Long and myself on either side and he was two or three bleachers up and came down the bleachers and body checked me. And the look on his face was very defiant, almost ha, ha.

The juvenile objected to this testimony and the trial court overruled his objection.

The juvenile, relying on *State v. Sanders*, 295 N.C. 361, 245 S.E.2d 674 (1978) (citation omitted), argues that ordinarily, "a witness's opinion of another person's intention on a particular occasion is generally held to be inadmissible." *Id.* at 369-70, 245 S.E.2d at 681 (citation omitted). Here, however, we believe that Ms. Wood's testimony is more appropriately characterized as describing the juvenile's demeanor on 26 April 2013.

Our Court addressed this issue in *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), by providing the following:

Opinion evidence as to the demeanor of a criminal defendant is admissible into evidence. *See State v. Moore*, 276 N.C. 142, 171 S.E.2d 453 (1970). The rule has been stated as follows:

The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things,

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derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.

A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation – a series of things – go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature.

Id. at 321, 406 S.E.2d at 900-901 (citations and quotation marks omitted).

Ms. Wood's testimony that juvenile's "look on his face" was "very defiant" related to her perception of the juvenile shortly after the alleged incident. Because this testimony stemmed from Ms. Wood's personal experience combined with Ms. Wood's observation of juvenile, it was admissible to shed light upon the circumstances surrounding the alleged incident, and thus, was relevant and admissible. *See* N.C. Gen. Stat. § 8C-1, Rule 401 and 402 (2013) (Rule 401 states that "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 states that "[a]ll relevant evidence is admissible" except as otherwise provided by the United States and North Carolina Constitutions, as well as an Act of Congress or the General Assembly, or by these rules). Therefore, we reject the juvenile's argument that the trial court erred by admitting this challenged testimony.

In the alternative, juvenile argues that the trial court should have granted his motion to dismiss because there was no other evidence to indicate that his act was intentional. We find the juvenile's arguments unpersuasive.

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Where the juvenile moves to dismiss, the trial court must determine ‘whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile’s] being the perpetrator of such offense. In reviewing a motion to dismiss a juvenile petition, the evidence must be considered in the light most favorable to the State, which is entitled to every reasonable inference that may be drawn from the evidence.

In re S.M., 190 N.C. App. 579, 581, 660 S.E.2d 653, 654-55 (2008) (citations omitted). An assault is “an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury.” *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted).

A thorough review of the record demonstrates that Ms. Wood’s testimony that the juvenile was “very defiant” is not the only evidence to establish that the juvenile acted with intent. Ms. Wood testified that the juvenile stood up after arguing with Ms. Long, and “there was plenty of room between Ms. Long and myself on either side and he was two or three bleachers up and came down the bleachers and body checked me.” Ms. Wood also testified that she “ended up taking three or four steps back to keep from falling.” Furthermore, Ms. Long testified that juvenile “stormed off the bleachers and Ms. Woods [sic] had come up behind me and he stormed right over her, ran right over her, pushed out the gym door.”

In a juvenile adjudication hearing, “the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. . . . [T]he trial judge acts as both judge and jury, thus resolving any conflicts in the evidence.” *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (citations omitted). Reviewing the foregoing evidence in the light most favorable to the State, we hold that there was sufficient evidence for the trial court to determine that the juvenile’s actions were intentional. Accordingly, we hold that the trial court did not err by denying the juvenile’s motion to dismiss the petition for misdemeanor assault.

C. Motion to Dismiss Petition for Disorderly Conduct

[3] The juvenile argues that his actions did not amount to disorderly conduct because there was insufficient evidence that juvenile’s actions amounted to a disturbance of the peace, order, or discipline at his school when no students, classes, or programs were in any way affected and his

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actions minimally affected the staff's activities. Accordingly, he argues that the trial court erred by denying his motion to dismiss the petition for disorderly conduct. We disagree.

Section 14-288.4(a)(6) of the North Carolina General Statutes provides that:

- (a) Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following:

....

- (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C. Gen. Stat. § 14-288.4(a)(6) (2013). "Our Supreme Court has held that the conduct must cause a 'substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled.'" *In re M.G.*, 156 N.C. App. 414, 416, 576 S.E.2d 398, 400 (2003) (citation omitted).

The juvenile cites to *In re Eller*, 331 N.C. 714, 417 S.E.2d 479 (1992) as providing guidance for identifying behavior which constitutes a violation of N.C. Gen. Stat. § 14-288.4(a)(6). In *Eller*, the trial court adjudicated two students as delinquent of disorderly conduct. The respondent Greer, then a fourteen-year-old student at Beaver Creek High School, made a move toward another student with a carpenter's nail in her hand during a basic special education reading class. *Id.* at 715, 417 S.E.2d at 480. The other student dodged respondent Greer's move. This move was made while the teacher was giving a reading assignment at the chalkboard. *Id.* The teacher in the class approached respondent Greer after relating the assignment and asked her what was in respondent Greer's hand. Respondent Greer willingly gave the teacher the carpenter's nail. The other students in the class "observed the discussion and resumed their work when so requested by [the teacher]." *Id.* At a later date, respondent Greer and another fifteen-year-old student named Eller, were in a mathematics class. The respondents Greer and Eller were seated at the rear of the classroom with their peers when they at least once each, struck the metal shroud of a radiator "more than two or three times." *Id.* at 716, 417 S.E.2d at 480. Each strike produced a "rattling, metallic noise"

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which caused their fellow peers to look “toward where the sound was coming from” and caused the teacher to interrupt her lecture for fifteen to twenty seconds each time. *Id.* at 716, 417 S.E.2d at 481. Our Supreme Court held that the State had not produced substantial evidence that the respondents’ behavior constituted a “substantial interference” because, *inter alia*, “the radiator incident merited no intervention by the instructor other than glares of disapproval for a total of at most sixty seconds during the entire class period” and “other students were only modestly interrupted from their work and returned to their lesson upon being instructed to do so by their teacher” after “the nail incident.” *Id.* at 718, 417 S.E.2d at 482.

The *Eller* court cited to two cases to support its conclusion – *State v. Wiggins*, 272 N.C. 147, 158 S.E.2d 37 (1967) and *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970). These two cases illustrate the level of interference necessary to sustain a conviction of disorderly conduct. The *Wiggins* court held that a motion for nonsuit was properly overruled by the trial court where student-defendants picketed on school grounds in front of a school building. *Wiggins*, 272 N.C. at 155, 158 S.E.2d at 43. The *Wiggins* court stated that “[a]s a direct result of the [student-defendants’] activities, the work of the class in bricklaying was terminated because the teacher could not retain the attention of his students, and disorder was created in the classrooms and hallways of the school building itself.” *Id.* In *Midgett*, our Court affirmed the denial of a motion for nonsuit when twelve student-defendants entered the office of the secretary to the principal of a public school. *Midgett*, 8 N.C. App. at 233, 174 S.E.2d at 127. The student-defendants told the secretary that “they were going to interrupt us that day” and “locked the secretary out of her office, moved furniture about, scattered papers and dumped some books on the floor.” *Id.* Because of the student-defendants’ actions, the secretary, the principal, and another teacher “were drawn or kept away from their jobs or classes” and school was dismissed early. *Id.* As such, our Court held that there was ample evidence to support all of the elements of disorderly conduct. *Id.* at 233, 174 S.E.2d at 128.

The juvenile argues that the circumstances of the present case are more similar to those found in *Eller* and distinguishable from the facts found in *Wiggins* and *Midgett*. After thoroughly reviewing the record, we disagree.

Ms. Long testified that there were 200 to 300 children in the gymnasium. Ms. Wood testified that “[e]verybody was watching what was happening between the teacher[, Ms. Long,] and the [juvenile].” Two students testified that while they were in the school’s gymnasium, they

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witnessed the disturbance. Ms. Long was not able to supervise students or fulfill her duties in the gymnasium because she had to assist in escorting the juvenile out of the gymnasium. When the juvenile was in the hallway, shouting at Ms. Long and Ms. Potts, at least four other students were in the hallway. In addition, Ms. Wood testified that during the incident, “there was a lot of disjointed information going on” as students “were being shoved on . . . busses.” Significantly, “a group of special needs students came into the office and because of everything that had just happened they had missed their bus.”

The facts of the case *sub judice*, viewed in the light most favorable to the State, demonstrate that the juvenile’s conduct caused a substantial interference with, disruption of, and confusion of the operation of the school. Unlike the circumstances found in *Eller* and comparable to the facts found in *Midgett*, the juvenile’s conduct merited intervention by several teachers, the assistant principal, as well as the school resource officer. In addition, the juvenile’s actions caused such disruption and disorder, similar to those found in *Midgett* and *Wiggins*, that a group of special needs students missed their buses. Therefore, we hold that the trial court did not err by denying the juvenile’s motion to dismiss the charge of disorderly conduct.

D. Disposition Hearing

[4] In his final argument, the juvenile argues that several errors occurred at his disposition hearing.

First, the juvenile argues that the fact that his dispositional hearing on 10 July 2013 commenced at 9:47 a.m. and concluded twelve minutes later, necessarily leads to the conclusion that the conditions of juvenile’s probation was signed by the trial court judge prior to the hearing, thus resulting in a “sham” hearing. We note that the juvenile cites to no authority to support his assumption. Furthermore, the juvenile’s assertion is unpersuasive as the trial court judge did not sign the disposition order until 12 July 2013, two days following the day of the hearing.

In his second argument, the juvenile contends that the trial court erred by allowing his mother to be heard only subsequent to the trial court entering his disposition. After careful review, we disagree.

Section 7B-2501 of the North Carolina General Statutes provides that “(b) The juvenile and the juvenile’s parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile.” N.C. Gen. Stat. § 7B-2501 (2013).

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At the disposition hearing, the trial court ordered, as a condition of the juvenile's disposition, that the juvenile's parents attend "Strengthening Families" parenting classes. Thereafter, the juvenile's counsel stated that the juvenile's mother "did want to say a few words." The trial court judge gave an opportunity to the juvenile's mother to speak. The following exchange took place:

THE COURT: . . . I think you'll be a very beneficial member of the Strengthening Families team. I have found at that program it's very helpful to share experiences.

And because you have that belief, I think you'll be a good leader possibly in that group and a good resource person and will be very beneficial not only for you but for others to see what it means to be supportive of your children and that sort of thing. And that's why I'm asking that you not as — certainly not as punishment for you but I think it would be — that group is a very beneficial group overall. And —

[The juvenile's mother:] Maybe I can be a positive influence on somebody else.

Assuming *arguendo* that the juvenile is correct in his contention that the trial court decided the terms of his disposition prior to allowing the juvenile's mother to be heard, we find this error to be harmless based on the fact that the juvenile's mother did not object to the condition of attending the "Strengthening Families" classes but effectively agreed with the trial court.

III. Conclusion

Where we find the juvenile's challenges to the adjudication and disposition orders unpersuasive, we affirm the orders of the trial court.

Affirmed.

Judges HUNTER, Robert C., and GEER concur.

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[234 N.C. App. 363 (2014)]

WALLACE SCOTT KIKER, PLAINTIFF
v.
CEDRIC JELANI WINFIELD, DEFENDANT

No. COA13-1471

Filed 17 June 2014

Venue—motion for change—no evidence of residency

The trial court erred in a negligence case by denying defendant's motion for change of venue. Although plaintiff alleged in his complaint that he was a citizen and resident of Harnett County where the complaint was filed, the complaint was not verified and thus, was not an affidavit or other evidence. There was no evidence in the record that plaintiff was a resident of Harnett County at the time of the filing of this action.

Judge BRYANT dissenting.

Appeal by defendant from order entered 18 November 2013 by Judge James M. Webb in Harnett County Superior Court. Heard in the Court of Appeals 22 April 2014.

Bain, Buzzard & McRae, LLP, by Robert A. Buzzard, for plaintiff-appellee.

Robert E. Ruegger for defendant-appellant.

STEELMAN, Judge.

Where there was no evidence in the record that plaintiff was a resident of Harnett County at the time of the filing of this action, the trial court erred in denying defendant's motion for change of venue.

I. Factual and Procedural Background

On 29 March 2010, Wallace Scott Kiker (plaintiff) was a passenger in a motor vehicle operated by Cedric Jelani Winfield (defendant) in Union County, North Carolina. According to plaintiff's complaint, defendant was negligent in causing a single vehicle collision, which resulted in personal injury to plaintiff. On 31 January 2013, plaintiff filed this action, seeking monetary damages and attorney's fees. On 12 August 2013, defendant filed an answer and motion for change of venue pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure, and N.C.

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Gen. Stat. §§ 1-82 and 1-83. Defendant contended that he was a citizen of Union County, and that plaintiff was incarcerated in a prison located in Spruce Pine. Defendant asserted that since neither party resided in Harnett County, that venue in Harnett County was improper, and that the case had to be transferred from Harnett County. Defendant also moved that the case be transferred from the district court division to the superior court division, based upon plaintiff's prayer for monetary relief.

Plaintiff served verified responses to defendant's First Set of Interrogatories. Plaintiff was asked to list his present address, along with each address where he had lived for the last five years. Four of the five addresses listed were in Monroe, in Union County, and the fifth was the Mountain View Correctional Institution in Spruce Pine. None of these addresses were in Harnett County.

On 18 November 2013, the trial court granted defendant's motion to transfer this action from district court to superior court. The trial court denied, without prejudice, defendant's motion for a change of venue from Harnett County.

From the order denying his motion for change of venue, defendant appeals.

II. Standard of Review

"The general rule in North Carolina, as elsewhere, is that where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C.G.S. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.'" *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (citations omitted).

III. Analysis

Defendant contends that the trial court erred in denying his motion for change of venue. We agree.

N.C. Gen. Stat. § 1-82 provides that, in cases such as this:

the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in the plaintiff's summons and complaint,

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subject to the power of the court to change the place of trial, in the cases provided by statute[.]

N.C. Gen. Stat. § 1-82 (2013). N.C. Gen. Stat. § 1-83 further clarifies that, upon the timely motion of defendant, the trial court may transfer venue where it is improper. *See* N.C. Gen. Stat. § 1-83 (2013). We have held that this change of venue is not discretionary, but rather is mandatory. *Miller*, 38 N.C. App. at 97, 247 S.E.2d at 279. Where venue is improper, the trial court must grant a motion for change of venue.¹

In the instant case, the only evidence in the record that would suggest that either party was a resident of Harnett County was plaintiff's allegation in his complaint that he was a citizen and resident of Harnett County. The complaint in this action was not verified. We have previously held that "[a]n unverified complaint is not an affidavit or other evidence." *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971). The fact that plaintiff's complaint was signed by counsel does not render it a verified complaint. There is therefore no evidence in the record that plaintiff was a resident of Harnett County at the commencement of the underlying lawsuit.

Further, in his verified answers to defendant's interrogatories, plaintiff stated the following:

1. State the date and place of your birth, your present address, the length of time you have lived there, and each address you have used for the last five (5) years.

ANSWER: August 4, 1970

Monroe, Union County, North Carolina
Mountain View Correctional Institution, Spruce Pine, NC
1814 John Moore Road, Monroe, NC;
1813 Timberlane Drive, Monroe, NC;
2512 Doster Road, Monroe, NC

Plaintiff's verified responses do not assert that at any time in the past five years (which covers the period of time going back to the accident) did plaintiff reside in Harnett County.

1. We distinguish this motion for change of venue, based upon the residency of the parties, from a discretionary motion for change of venue, based upon the convenience of the witnesses. We have held that the latter form of the motion for change of venue is subject to the trial court's discretion, and reviewable only for an abuse of discretion. *See Phillips v. Currie Mills, Inc.*, 24 N.C. App. 143, 144, 209 S.E.2d 886, 886 (1974).

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We hold that, in the absence of any evidence that plaintiff resided in Harnett County, the trial court erred in denying defendant's motion for change of venue. We vacate the trial court's order denying the motion, and remand with instructions for the trial court to transfer this action to Union County.

VACATED AND REMANDED.

Judge HUNTER, Robert C., concurs.

BRYANT, Judge, dissenting.

The majority vacates the trial court's order denying defendant's motion for change of venue and remands with instructions for the trial court to transfer this action to Union County. Because I believe the trial court did not abuse its discretion in denying defendant's motion, I must respectfully dissent.

North Carolina General Statutes, section 1-82, holds that where an action is not based upon real property, "the action must be tried in the county in which the plaintiff[] . . . reside[s] at its commencement . . ." N.C. Gen. Stat. § 1-82 (2013). A motion for change of venue must be granted where it is clear that the action has been brought in the wrong county. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 743, 71 S.E.2d 54, 55-56 (1952). Where venue is appropriate under N.C.G.S. § 1-82, a trial court's decision as to whether to permit a non-mandatory transfer is reviewed for abuse of discretion. *Centura Bank v. Miller*, 138 N.C. App. 679, 683-84, 532 S.E.2d 246, 249-50 (2000).

The majority contends the trial court erred in denying defendant's motion because plaintiff failed to provide evidence of his residency for venue purposes. Specifically, defendant contends, and the majority agrees, that plaintiff failed to provide evidence that plaintiff resided in Harnett County at the time of filing his complaint. I respectfully disagree.

The majority reasons that based on *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971) (noting that "[a]n unverified complaint is not an affidavit or other evidence"), there is no evidence in the record that plaintiff resided in Harnett County. The majority fails to recognize that the complaint was signed by plaintiff's Harnett County attorney. The first allegation in the complaint is: "1. That Plaintiff is a citizen and resident of Harnett County." Pursuant to Rule 11 of our Rules of Civil Procedure, "[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of

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his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law[.]” N.C. Gen. Stat. § 1A-1, Rule 11(a) (2013). Further, plaintiff’s attorney signed the affidavit of service indicating his representation of plaintiff and that service of summons and complaint had been completed upon defendant. Although the majority is technically correct in describing plaintiff’s complaint as “unverified,” the fact remains that plaintiff’s counsel signed the complaint indicating that plaintiff’s attorney believed plaintiff was a resident of Harnett County at the time the complaint was filed and filed an affidavit of service as to the complaint. Therefore, the record contains some evidence that was before the trial court as to plaintiff’s residency at the commencement of the action.¹

In its order denying defendant’s motion for change of venue, the trial court made no findings of fact, noting only that: “The Court having reviewed the Defendant’s motion, applicable law and after hearing arguments of counsel, HEREBY ORDERS that Defendant’s motion is denied, without prejudice.” The record does not contain a transcript of the hearing before the trial court. Without a transcript of the hearing, we cannot know what transpired during that hearing and it would be inappropriate to speculate as to the factors that led to the decision of the trial court.

It is well-established that “an appellate court accords great deference to the trial court . . . because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision[.]” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (2011). Further, a trial court’s decision on whether to permit transfer of venue is reviewed for abuse of discretion where it appears that venue is appropriate. *Centura Bank*, 138 N.C. App. at 683-84, 532 S.E.2d at 249-50.

As such, based on the record we do have before this Court, where there does exist evidence of plaintiff’s residency in Harnett County, I cannot hold that the trial court abused its discretion and erred in denying defendant’s motion for change of venue. For the reasons stated herein, I would affirm the order of the trial court.

1. Defendant points to an interrogatory in which plaintiff lists four Union County addresses, and a present location at the Mountain View Correctional Institution in Spruce Pine, as proof that venue in Harnett County is inappropriate. However, plaintiff answered defendant’s interrogatory on 29 October 2013, almost ten months after plaintiff filed his complaint.

LAKE v. STATE HEALTH PLAN FOR TEACHERS & STATE EMP.

[234 N.C. App. 368 (2014)]

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, JAMES D. WILSON, BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, AND JEAN C. NARRON,
AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,
A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES'
COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS' AND STATE EMPLOYEES'
RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES
TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA,
A BODY POLITIC AND CORPORATE, JANET COWELL, IN HER OFFICIAL CAPACITY AS TREASURER OF THE
STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA13-1006

Filed 17 June 2014

1. Appeal and Error—interlocutory orders and appeals—sovereign immunity—personal jurisdiction—substantial right—failure to state a claim—no substantial right

Defendant's appeal from the trial court's interlocutory order denying defendant's motion to dismiss plaintiff's claim based on sovereign immunity and personal jurisdiction was heard by the Court of Appeals on the merits as it affected a substantial right. Defendant's appeal from the trial court's interlocutory order denying defendant's motion to dismiss based on the failure to state a claim upon which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) was dismissed as it did not affect a substantial right.

2. Immunity—sovereign—allegation of valid contract—sufficient to waive defense

The trial court did not err by denying defendants' motion to dismiss plaintiffs' claim for breach of contract pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2). Plaintiffs sufficiently alleged a valid contract between themselves and the State in their complaint to waive the defense of sovereign immunity.

Appeal by Defendants from order entered 23 May 2013 by Judge Edwin G. Wilson, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 6 March 2014.

LAKE v. STATE HEALTH PLAN FOR TEACHERS & STATE EMPs.

[234 N.C. App. 368 (2014)]

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Marc Bernstein, for the Defendants-appellants.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by Michael L. Carpenter, for Plaintiffs-appellees.

DILLON, Judge.

The State Health Plan for Teachers and State Employees, *et al.*, (the “Defendants”) appeal from the denial of their motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6) in favor of I. Beverly Lake, *et al.*, (the “Plaintiffs”). For the foregoing reasons, we affirm in part, and dismiss in part.

I. Background

On 20 April 2012, Plaintiffs filed a complaint alleging, *inter alia*, that they are all former employees and current retirees with the State of North Carolina with at least five years of contributory service; as part of their employment, they were offered certain benefits, including a health benefit plan after retirement through the State Health Plan; this health benefit plan provided the option to each Plaintiff to participate on a non-contributory 80/20 basis or on a 90/10 basis with a contribution; they had vested by working at least five years and were eligible upon retirement to receive these health insurance benefits from the State Health Plan; Defendants stopped providing a non-contributory 80/20 health benefit in 2011 and the 90/10 plan for retirees in 2009, respectively; and that these actions by Defendants constituted a breach of contract.¹

On 23 July 2012, Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6), arguing that the trial court lacked jurisdiction based, in part, on Defendants’ sovereign immunity defense and that the complaint should otherwise be dismissed because the allegations therein failed to state a claim upon which relief could be granted. On 23 May 2013, Judge Edwin G. Wilson, Jr.², entered an order denying Defendants’ motion to dismiss in its entirety. On 14 June 2013, Defendants filed notice of appeal from the trial court’s denial of their motion to dismiss.

1. Plaintiffs also raised a number of other claims which are not at issue in Defendants’ appeal.

2. On 26 November 2012, the Chief Justice of the North Carolina Supreme Court designated this case as “exceptional” under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and assigned Judge Wilson to the case.

LAKE v. STATE HEALTH PLAN FOR TEACHERS & STATE EMPES.

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II. Interlocutory Appeal

[1] On 19 December 2013, Plaintiffs filed a motion to dismiss Defendants' appeal with this Court, arguing that "the appeal is an impermissible interlocutory appeal and Defendant-Appellants do not have a substantial right to immediate review[.]" Plaintiffs raised similar arguments in their brief on appeal.

We have recently stated that

"[a]s a general rule, interlocutory orders are not immediately appealable." *Id.* (citation omitted). However, "immediate appeal of interlocutory orders and judgments is available in at least two instances: when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1)." *Id.* (quotation omitted).

Jenkins v. Hearn Vascular Surgery, P.A., ___ N.C. App. ___, ___, 719 S.E.2d 151, 153-54 (2011). Defendants admit that their appeal is interlocutory, and we agree. Since there is no Rule 54(b) certification, we must determine whether Defendants' appeal affects a substantial right.

In North Carolina, "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *McClennahan v. N.C. Sch. of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 443 (2007). However, as stated by our Supreme Court, "[t]he denial of a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12(b)(6), Rules of Civil Procedure, G.S. 1A-1, is an interlocutory order from which no immediate appeal may be taken." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982) (citation omitted). Therefore, we dismiss Defendants' appeal as to any issues related to the trial court's Rule 12(b)(6) ruling regarding the validity of the alleged contract as interlocutory, and address only those issues related to sovereign immunity and Rule 12(b)(2)³, as those issues relate to a substantial right and are

3. Our Supreme Court has stated that an order denying a motion to dismiss for lack of subject-matter jurisdiction, pursuant to Rule 12(b)(1) is not immediately appealable, but that an order denying a motion for lack of personal jurisdiction, pursuant to Rule 12(b)(2) is immediately appealable. *Teachy*, 306 N.C. at 327-28, 293 S.E.2d at 184. The Court in *Teachy* also noted that there is a split in authority around the country as to whether a motion to dismiss based on sovereign immunity is properly a motion under Rule 12(b)(1)

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immediately appealable. See *McClennahan*, 177 N.C. App. at 808, 630 S.E.2d at 199. We next turn to address Defendants' appeal and their arguments regarding sovereign immunity.

III. Rule 12(b)(2) Dismissal Based on Sovereign Immunity

[2] To survive a Rule 12(b)(2) motion to dismiss based on sovereign immunity, "the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). However, consistent with the concept of notice pleading, "as long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the State has waived the defense of sovereign immunity is not necessary." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (citation omitted).

Here, Plaintiffs argue that they have sufficiently pled that sovereign immunity has been waived by alleging the existence of a valid contract; and, therefore, the trial court properly denied Defendants' Rule 12(b)(2) motion to dismiss. Specifically, Plaintiffs pled that they each had a contract of employment with the State and that these contracts included a promise to provide a guaranteed health benefit during retirement on a non-contributory 80/20 basis or a 90/10 basis with a contribution. Our Supreme Court has held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a *valid* contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (emphasis added). We have held that this waiver of immunity applies in the context of employment contracts:

or under Rule 12(b)(2) and that the determination of this issue is relevant in North Carolina in situations involving an interlocutory appeal denying a motion to dismiss based on sovereign immunity. *Id.* However, our Supreme Court did not ultimately resolve the issue in *Teachy*, deciding rather to review that appeal based on its supervisory jurisdiction. *Id.* Though our Supreme Court has not resolved the issue as to whether a motion to dismiss based on sovereign immunity is a motion under Rule 12(b)(1) or under Rule 12(b)(2), our Court has determined that the denial of a motion to dismiss based on sovereign immunity can be based on Rule 12(b)(2), and is, therefore, immediately appealable. See, e.g., *Data Gen. Corp. v. City of Durham*, 143 N.C. App. 97, 99-100, 545 S.E.2d 243, 245-46 (2001), explained in *Atl. Coast Conf. v. Univ. of Md.*, ___ N.C. App. ___, ___, 751 S.E.2d 612, 617 (2013). Therefore, we dismiss Defendants' appeal to the extent that it is based on the denial of their motion to dismiss for lack of subject-matter jurisdiction, pursuant on Rule 12(b)(1).

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“The existence of the relation of employer and employee . . . is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied.” *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934). Guided by this principle, as well as the reasoning in [*Smith v State*, 289 N.C. 303, 222 S.E.2d 412 (1976)], we hold that the County may not assert the defense of sovereign immunity in this case We agree with plaintiffs’ assertion that the employment arrangement between the County and plaintiffs was contractual in nature, although the contract was implied. Employment contracts may be express or implied. An implied contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding. . . . **We do not limit *Smith* to written contracts; its reasoning is equally sound when applied to implied oral contracts.**

Archer v. Rockingham Cty., 144 N.C. App. 550, 557, 548 S.E.2d 788, 792-93 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002).

We believe that Plaintiffs sufficiently pled a valid contract. For instance, Plaintiffs alleged in their complaint that the State of North Carolina acted by offering specific health plans when Plaintiffs were hired and made representations to Plaintiffs while they were employed that if they worked five years then those health plans would vest and be irrevocable upon retirement. Also, Plaintiffs alleged that they acted by accepting employment based, in part, on these health plans and working a set amount of time with the State of North Carolina so that those health plans would vest or be irrevocable upon retirement. We believe that our decision in *Sanders v. State Pers. Comm’n*, 183 N.C. App. 15, 644 S.E.2d 10, *disc. review denied*, 361 N.C. 696, 652 S.E.2d 654 (2007), is instructive.

In *Sanders*, the plaintiffs, who were employed as “temporary” employees by the State of North Carolina for more than 12 consecutive months, filed their action alleging that a rule promulgated by the State Personnel Commission prohibited individuals from being employed by the State as temporary employees for more than twelve consecutive months; that this rule was part of their contracts of employment; that by working for more than twelve consecutive months, they were entitled to be treated as “permanent” State employees; and that the State breached their contracts of employment by “wrongfully den[y]ing” the plaintiffs

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the employment benefits that permanent employees are entitled to receive. *Id.* at 16, 644 S.E.2d at 11. The State moved to dismiss the plaintiffs' breach of contract claim based on sovereign immunity, a motion which was granted by the trial court. *Id.* at 17, 644 S.E.2d at 11. On the plaintiffs' appeal, the State argued that the "plaintiffs' claim for relief based on a breach of contract cannot overcome sovereign immunity . . . because the alleged contract is 'implied,' 'imaginary,' and in no way 'an authorized and valid contract.'" *Id.* at 19, 644 S.E.2d at 12.

In our opinion, we stated that the plaintiffs alleged "that the State entered into employment contracts with the plaintiffs, incorporating state personnel regulations, pursuant to which they were entitled to certain benefits as a result of their employment for more than 12 months." *Id.* at 18-19, 644 S.E.2d at 13. We stated that these "allegations [were] materially indistinguishable from those found sufficient in several opinions of this Court[.]" including *Peveall v. County of Alamance*, 154 N.C. App. 426, 430-31, 573 S.E.2d 517, 519-20 (2002) (reversing the trial court's dismissal based on sovereign immunity when the plaintiff had alleged a valid employment contract in which the defendant had agreed to provide the plaintiff "disability retirement benefits . . . in exchange for five years of continuous service"), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 632 (2003) and *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 150-51, 544 S.E.2d 587, 589, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 40 (2001). *Id.* at 19-20, 644 S.E.2d at 13. In further comparing these cases, we held,

[p]laintiffs allege that defendants are manipulating State personnel policies and benefit plans, which govern the terms of state employment, to avoid providing plaintiffs benefits that they rightfully earned as a result of the tenure of their employment. Plaintiffs' complaint sufficiently alleges that defendants accepted plaintiffs' services and, therefore, "may not claim sovereign immunity as a defense" to their alleged commitment to provide the benefits provided by the personnel policies setting forth the terms of employment.

Id. at 20, 644 S.E.2d at 13 (quoting *Hubbard*, 143 N.C. App. at 154, 544 S.E.2d at 590).

In overruling the defendants' argument "that any contract was only 'implied' and, therefore, no waiver of sovereign immunity has occurred[.]" the Court relied on the holding in *Archer, supra*, which extended the holding in *Smith, supra*, regarding written contracts to

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oral implied contracts and also noted that *Archer* “held that plaintiffs could assert their claims because they were ‘in the nature of a contractual obligation[.]’” *Id.* at 20-21, 644 S.E.2d at 13-14.

Like *Sanders*, Defendants here essentially make an argument that their Rule 12(b)(2) motion should have been granted because Plaintiffs failed to allege an express agreement concerning the retirement health benefits. Specifically, they point to Plaintiffs’ allegations that Defendants have, through representations, policies, and statutes, “avoid[ed] providing plaintiffs benefits that they rightfully earned as a result of the tenure of their employment” and because of this alleged exchange, Defendants, “‘may not claim sovereign immunity as a defense’ to their alleged commitment to provide the benefits provided by the personnel policies setting forth the terms of employment.” *See id.* at 20, 644 S.E.2d at 13. However, as in *Sanders*, we believe that Plaintiffs have alleged something “in the nature of a contractual obligation” which would still amount to a valid contract under *Archer*, sufficient to survive a Rule 12(b)(2) motion to dismiss based on sovereign immunity. *See Sanders*, 183 N.C. App. at 21, 644 S.E.2d at 13.

We further held in *Sanders* that the defendants’ arguments “that the alleged contract is ‘imaginary’ and not ‘an authorized and valid contract’” went to the merits of the plaintiffs’ breach of contract claims, pointing out that

in considering the applicability of sovereign immunity to allegations of breach of a governmental employment contract, “that we are not now concerned with the merits of plaintiffs’ contract action. . . . [W]hether plaintiffs are ultimately entitled to relief are questions not properly before us.” *Archer v. Rockingham County*, 144 N.C. App. 550, 558, 548 S.E.2d 788, 793 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). *See also Smith*, 289 N.C. at 322, 222 S.E.2d at 424 (“We are not now concerned with the merits of the controversy. . . . We have no knowledge, opinion, or notion as to what the true facts are. These must be established at the trial. Today we decide only that plaintiff is not to be denied his day in court because his contract was with the State.”).

Id. at 20, 644 S.E.2d at 13-14.

In the same way, Defendants here make a number of arguments which go to the *merits* of Plaintiffs’ breach of contract claims. However, “[t]his Court has consistently held that we are not to consider the

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merits of a claim when addressing the applicability of sovereign immunity as a potential defense to liability.” *Cam Am South, LLC v. State of North Carolina*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2014 N.C. App. LEXIS 558 at *16 (N.C. App. June 3, 2014). Rather, our analysis is restricted to whether Plaintiffs have sufficiently alleged that Defendants have waived sovereign immunity. As Plaintiffs sufficiently alleged a valid contract between them and the State in their complaint to waive the defense of sovereign immunity, we affirm the trial court’s order denying Defendants’ motion to dismiss pursuant to Rule 12(b)(2). *See Cam Am South*, at *18 (holding that “the State waives its sovereign immunity when it *enters* into a contract with a private party, not when it engages in conduct that may or may not constitute a breach”) (emphasis in original).

IV. Conclusion

For the foregoing reasons, we affirm the trial court’s order denying Defendants’ motion to dismiss this action based on their sovereign immunity defense, pursuant to Rule 12(b)(2); and we dismiss Defendants’ appeal of the trial court’s order denying their motion to dismiss to the extent the order is based on grounds other than Defendants’ sovereign immunity defense.

AFFIRMED, IN PART, and DISMISSED, IN PART.

Judge BRYANT and Judge CALABRIA concur.

LEWIS v. N.C. DEP'T OF CORR.

[234 N.C. App. 376 (2014)]

JAMES J. LEWIS, EMPLOYEE, PLAINTIFF

v.

N.C. DEPARTMENT OF CORRECTION, EMPLOYER, SELF-INSURED
(CORVEL CORPORATION, ADMINISTRATOR), DEFENDANT

No. COA13-1348

Filed 17 June 2014

Workers' Compensation—opinion and award—interest—benefits

The Full Industrial Commission erred in a workers' compensation case by failing to require defendant to pay interest on the benefits awarded to plaintiff in an opinion and award issued from the date of the initial hearing in this dispute, pursuant to N.C.G.S. § 97-86.2.

Appeal by plaintiff-employee from Order of the Full Commission entered 5 September 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 May 2014.

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

Roy Cooper, Attorney General, by Deborah M. Greene, Assistant Attorney General, for defendant-appellee.

MARTIN, Chief Judge.

On 26 March 1996, plaintiff-employee James J. Lewis was awarded temporary total disability benefits from 11 September 1994 until his return to work along with the cost of medical treatment for posttraumatic stress disorder arising from his employment with defendant North Carolina Department of Correction. *Lewis v. N.C. Dep't of Corr. (Lewis II)*, 167 N.C. App. 560, 561, 606 S.E.2d 199, 200 (2004); *see also Lewis v. N.C. Dep't of Corr. (Lewis I)*, 138 N.C. App. 526, 526–27, 531 S.E.2d 468, 469 (2000). The Full Commission entered an additional Opinion and Award dated 10 July 2003, concluding that plaintiff's "original compensable injury, post-traumatic stress disorder, exacerbated and aggravated [his] pre-existing diabetes," and awarded payment of medical expenses for treatment for plaintiff's diabetic condition and related periodontal condition. *Lewis II*, 167 N.C. App. at 562–63, 606 S.E.2d at 201–02. Plaintiff continued to receive compensation for temporary total disability pursuant to N.C.G.S. § 97-29.

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On 5 February 2010, plaintiff filed a Form 33 to request a hearing because he wished to receive permanent disability benefits pursuant to N.C.G.S. § 97-31, as well as other allowances. The deputy commissioner ruled, *inter alia* as related to the matters presented by this appeal, that plaintiff had reached maximum medical improvement on 19 November 2009 and was entitled to receive permanent benefits pursuant to N.C.G.S. § 97-31, rather than temporary disability benefits under N.C.G.S. § 97-29. As a result, plaintiff was awarded permanent partial disability benefits in a lump sum based on the ratings schedule contained in N.C.G.S. § 97-31, minus the amount of temporary total disability benefits defendant had paid plaintiff since 19 November 2009, and an additional lump sum for permanent partial disability ratings to body parts and organs not specifically listed in N.C.G.S. § 97-31, pursuant to N.C.G.S. § 97-31(24).

Both parties appealed to the Full Commission which, by an Opinion and Award dated 21 February 2012 and amended 23 May 2012, affirmed the deputy commissioner's award, with the exception that the award for non-listed body parts and organs made pursuant to N.C.G.S. § 97-31(24) was reduced from \$127,000 to \$95,000. On 3 August 2012, plaintiff filed a motion to require defendant to pay interest on the lump sum award. The Full Commission denied the motion on 23 July 2013 and denied plaintiff's motion for reconsideration on 5 September 2013. In denying the motion, the Full Commission reasoned that the purpose of interest awarded pursuant to N.C.G.S. § 97-86.2 is to compensate an individual for the loss of the use of money to which he is entitled while an appeal is pending. During the pendency of the appeals in the present case, defendant continued to pay plaintiff weekly benefits under N.C.G.S. § 97-29. Thus, the Full Commission reasoned that because an individual cannot receive benefits under both N.C.G.S. § 97-29 and N.C.G.S. § 97-31, none of plaintiff's benefits were past due at the date of the initial hearing or the final award, and no interest was due. Plaintiff appeals.

On appeal, plaintiff argues the Full Commission should have required defendant to pay interest on the benefits awarded to plaintiff in the 23 May 2012 Opinion and Award from the date of the initial hearing in this dispute. We agree.

Generally, when we review an opinion and award of the Industrial Commission our review is limited to determining: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). However,

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we review the Commission's conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

In this appeal, we address only the issue of whether defendant is required to pay plaintiff interest pursuant to N.C.G.S. § 97-86.2 on the unpaid portion of plaintiff's benefits from the date of the initial hearing giving rise to this dispute. N.C.G.S. § 97-86.2 states:

In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer *shall pay interest on the final award or unpaid portion thereof* from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

N.C. Gen. Stat. § 97-86.2 (2013) (emphasis added).

In the past, when interpreting the word shall, our courts have stated: "It is well established that 'the word "shall" is generally imperative or mandatory.'" *Multiple Claimants v. N.C. Dept of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). As a result, if all of the statutory requirements are satisfied then the Commission must apply the statute and has no "discretion in making the required determination." *Puckett v. Norandal USA, Inc.*, 211 N.C. App. 565, 573-74, 710 S.E.2d 356, 362 (2011). Furthermore, we have stated that the goals of this statute are: "(a) [T]o compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money, and (c) to promote settlement.'" *Childress v. Trion, Inc.*, 125 N.C. App. 588, 592, 481 S.E.2d 697, 699 (alteration in original) (quoting *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984)), *disc. review denied*, 346 N.C. 276, 487 S.E.2d 541 (1997).

Based on our reading of the statute, plaintiff is entitled to interest on the award in the 23 May 2012 Opinion and Award from the date of the initial hearing, 27 August 2010, until the date that the award was paid in full for the following reasons. First, the statute says that the "employer *shall pay interest on the . . . unpaid portion thereof* from the date of the initial hearing." N.C. Gen. Stat. § 97-86.2 (emphasis added). As discussed earlier, by its use of the word "shall" the statute compels the Commission to

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award interest on the unpaid portion of an award. Second, the purpose of interest is to compensate an individual for their inability to use the awarded money while an appeal is pending. In this case, plaintiff was unable to use the full amount of his lump sum monetary award in the 6 April 2011 Opinion and Award because defendant did not pay the award while the appeal was pending; defendant did have the benefit of the use of the awarded money during the appeal. Therefore, plaintiff is entitled to interest as compensation for his inability to use the awarded money during his appeal, and defendant is foreclosed from retaining the benefit of being able to use the money during the appeal.

There is no issue of double recovery here. The Full Commission reasoned that plaintiff was not entitled to interest under N.C.G.S. § 97-86.2 because he “received weekly benefits pursuant to N.C. Gen. Stat. § 97-29 throughout the pendency of the litigation,” and it would be a double recovery for plaintiff to receive benefits under N.C.G.S. § 97-31 and N.C.G.S. § 97-29 for the same time period. The 23 May 2012 Opinion and Award, however, prevented this result. The Opinion and Award made the following awards:

1. Subject to a reasonable attorney’s fee approved herein and *the credit owed defendant for the temporary total disability compensation benefits paid to plaintiff after November 19, 2009*, defendant shall pay permanent partial disability compensation to plaintiff for permanent partial disability ratings to body parts specifically listed in N.C. Gen. Stat. Section 97-31 at the rate of \$293.64 per week for a total of 285.6 weeks. This amount shall be paid in a lump sum.
2. Subject to a reasonable attorney’s fee approved herein, defendant shall pay equitable compensation in the total amount of \$95,000.00 for permanent injury to important internal or external organs and body parts pursuant to N.C. Gen. Stat. Section 97-31(24). This amount shall be paid in a lump sum, subject to the attorney fee hereinafter approved.

(Emphasis added.) The Opinion and Award is clear that defendant is entitled to a credit for the total amount of the temporary total disability benefits paid to plaintiff under N.C.G.S. § 97-29. Thus, a double recovery does not occur because the amount paid to plaintiff under N.C.G.S. § 97-29 is deducted from the balance of the permanent partial disability benefits awarded to plaintiff under N.C.G.S. § 97-31. Plaintiff is not

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collecting benefits under N.C.G.S. § 97-29 and N.C.G.S. § 97-31 at the same time.

In addition, the Full Commission erred in reasoning that none of plaintiff's award was past due. The Full Commission reasoned that because none of plaintiff's benefits were past due at the time of the initial hearing in this matter or when the 23 May 2012 Opinion and Award was entered, plaintiff was not entitled to interest. N.C.G.S. § 97-86.2 states that the "employer shall pay interest on the final award or *unpaid portion* thereof from the date of the initial hearing on the claim." N.C. Gen. Stat. § 97-86.2 (emphasis added). Thus, it does not matter that defendant had made weekly payments to plaintiff during the pendency of the appeal and that none of those payments were past due because the full amount of the lump sum award "became due" as of the date of the initial hearing. Therefore, the statute entitles plaintiff to interest on the unpaid portion of the award from the date of the initial hearing in this matter.

For the reasons stated herein we reverse the 5 September 2013 Order of the Full Commission and remand this case to the Full Commission for issuance of an order consistent with this opinion.

Reversed and remanded.

Judges STEELMAN and DILLON concur.

WILLIAM S. MILLS, ANCHILLARY ADMINISTRATOR OF THE ESTATE OF
AARON LORENZO DORSEY, DECEASED, PLAINTIFF-APPELLANT

v.

DUKE UNIVERSITY, A NOT FOR PROFIT CORPORATION, LARRY CARTER, AND
JEFFREY LIBERTO, JOINTLY AND SEVERALLY, DEFENDANTS-APPELLEES

No. COA13-1164

Filed 17 June 2014

1. Immunity—public official immunity—campus police officers

Campus police officers are entitled to public official immunity for their acts in furtherance of their official duties so long as those acts were not corrupt, malicious, or outside of and beyond the scope of their duties.

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2. Wrongful Death—officers in individual capacities—summary judgment—no showing acts were corrupt, malicious, or outside of and beyond scope of duties

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims of wrongful death against defendant officers in their individual capacities. The evidence viewed in the light most favorable to plaintiff did not show that the acts of the officers leading to the victim's death were corrupt, malicious, or outside of and beyond the scope of their duties.

3. Appeal and Error—preservation of issues—failure to obtain ruling at trial court—false arrest

Although plaintiff contended the trial court erred in a wrongful death case by granting summary judgment in favor of defendants on plaintiff's claim of false arrest, plaintiff failed to preserve this issue based on failure to obtain a ruling at the trial court.

Appeal by Plaintiff from judgment entered 6 June 2013 by Judge Paul G. Gessner in Superior Court, Durham County. Heard in the Court of Appeals 17 March 2014.

Law Office of Michael R. Dezsi, PLLC, by Michael R. Dezsi, pro hac vice; and Tin Fulton Walker & Owen, PLLC, by Adam Stein, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog, LLP, by Dan M. Hartzog and Katie Weaver Hartzog, for Defendants-Appellees.

McGEE, Judge.

Aaron Lorenzo Dorsey ("Mr. Dorsey") was shot and killed by a Duke University Police officer at approximately 1:00 a.m. on 13 March 2010, just outside the main entrance to Duke University Hospital in Durham ("the hospital"). When the shooting occurred, Preston Locklear was being treated for a serious injury in the intensive care unit of the hospital. A number of members of Preston Locklear's family ("the Locklear family") were at the hospital that morning visiting him. The Locklear family members included: Charles Brayboy, Krecia Ann Brayboy, Alena Hull, Christine Locklear, Debbie Locklear, Justin Locklear, Shawn Locklear, Lenora Locklear, and Billie Jo Locklear.

In his deposition, Mondrez Pamplin ("Mr. Pamplin"), testified that he was a hospital security guard working in the front lobby of the hospital

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on the night shift between 12 and 13 March 2010. Shortly before 1:00 a.m. on 13 March 2010, a member of the Locklear family approached him to complain about a man panhandling near the entrance of the hospital. Mr. Pamplin went outside and saw Mr. Dorsey. He asked Mr. Dorsey if he was visiting someone in the hospital, and Mr. Dorsey replied that he was not. Mr. Pamplin then suggested to Mr. Dorsey that he leave Duke University property. Mr. Dorsey did not leave, so Mr. Pamplin contacted Duke University Police to report Mr. Dorsey as a suspicious person. Duke University Police officers Larry Carter (“Officer Carter”) and Jeffrey Liberto (“Officer Liberto”) (together, “the officers”) responded, arriving at the entrance of the hospital shortly after 1:00 a.m. Mr. Pamplin asked the officers to “check [Mr. Dorsey] out.”

The officers approached Mr. Dorsey and asked for identification. Mr. Dorsey turned away from the officers and started walking away. At this point, according to the officers’ testimony, Officer Liberto grabbed Mr. Dorsey and a struggle ensued. Officer Carter went to assist Officer Liberto, and Mr. Dorsey grabbed Officer Carter’s holstered weapon and attempted to remove it from Officer Carter’s holster. Officer Carter pressed down on Mr. Dorsey’s hand or hands, attempting to prevent Mr. Dorsey from obtaining the weapon. Officer Carter was yelling: “He’s got my gun. He’s getting my gun.” Officer Liberto let go of Mr. Dorsey and first began hitting Mr. Dorsey with his fists and then with his police baton. Officer Carter ended up struggling with Mr. Dorsey on the ground. Officer Liberto repeatedly asked if Mr. Dorsey had Officer Carter’s gun, and both officers commanded Mr. Dorsey to let go of the weapon.

Some members of the Locklear family testified by deposition that they saw Mr. Dorsey grab Officer Carter’s weapon and struggle with Officer Carter in an attempt to take that weapon. Other members of the Locklear family testified they could not see Mr. Dorsey’s hands and, therefore, could not say if Mr. Dorsey was grabbing Officer Carter’s weapon. However, they did hear someone yelling things like: “He’s grabbed the gun[,]” “[l]et go; let go; let go,” and “let go of the gun.” Some of the Locklear family deposition testimony differed from State Bureau of Investigation (“SBI”) reports written after SBI agents had interviewed those family members immediately following the shooting. The officers were not able to subdue Mr. Dorsey and, at some point during the struggle, Officer Liberto drew his service weapon and shot Mr. Dorsey in the head at close range. Mr. Dorsey died at the scene.

This action was filed on 16 September 2011 by William S. Mills, administrator of Mr. Dorsey’s estate (“Plaintiff”). Plaintiff’s complaint named as defendants Duke University (“Duke”), Officer Carter, and

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Officer Liberto (together, “Defendants”). Plaintiff’s complaint included as causes of action: (1) wrongful death/negligence, (2) wrongful death/assault and battery, and (3) wrongful death/willful and wanton conduct. Defendants filed a motion for summary judgment on 2 May 2013, alleging that the officers: (1) were “legally justified in using reasonable force to protect the lives and safety of themselves and other innocent bystanders[,]” (2) were “entitled to public official immunity[,]” (3) “acted reasonably at all times and there [was] no negligence or other grounds for liability which can be imputed to Duke[,]” (4) committed no acts justifying punitive damages, and (5) that “[Mr.] Dorsey’s actions at the time of the incident . . . were the sole proximate cause of his death and constitute contributory negligence[.]”

The trial court entered judgment on 6 June 2013 granting summary judgment in favor of Defendants on all claims, and dismissing the action with prejudice. Plaintiff appeals. There are additional relevant facts that will be discussed in the body of the opinion.

I.

Plaintiff argues that the trial court erred in granting summary judgment in favor of Defendants. We disagree.

We first note that all Plaintiff’s arguments on appeal concern Officers Carter and Liberto in their individual capacities, and that Plaintiff does not argue that summary judgment, with respect to Duke, was improper. Therefore, summary judgment in favor of Duke is affirmed. Likewise, to the extent, if any, that Plaintiff’s complaint contained claims against Officers Carter and Liberto in their official capacities, summary judgment on those claims is affirmed.

Summary judgment is proper only “‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 578-79, 573 S.E.2d 118, 123 (2002) (citation omitted).

This Court has recognized that deciding what constitutes a bona fide issue of material fact is seldom an easy task. Nonetheless, we have instructed that “an issue is genuine if it is supported by substantial evidence,” which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion. Further, we have said that “[a]n issue is material if the facts alleged would

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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 party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial. “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” “All inferences of fact must be drawn against the movant and in favor of the nonmovant.”

Id. at 578-79, 573 S.E.2d at 123-24 (citations omitted).

II.

[1] We must first address whether Officers Carter and Liberto are protected by public official immunity. “[P]ublic officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties.’ Police officers are public officials.” *Clayton v. Branson*, 153 N.C. App. 488, 492, 570 S.E.2d 253, 256 (2002) (citations omitted). “A public official can be held individually liable if it is prove[n] that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.” *Id.* (citation and quotation marks omitted).

Plaintiff contends that the officers cannot be covered by public official immunity because they were hired by, and were working for, a private institution – Duke University. We disagree.

“[A] policeman is an officer of the State.” *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965) (citations omitted). “It is not the method by which a policeman becomes a member of the police force of a municipality that determines his status but the nature and extent of his duties and responsibilities with which he is charged under the law.” *Id.* “To constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question.” *Id.* “An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power.” *Id.*; see also *State v. Ferebee*, 177 N.C. App. 785, 788, 630 S.E.2d 460, 462 (2006) (citation omitted) (“Under

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. . . the Campus Police Act, campus police officers have the same statutory authority granted to municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions within their jurisdictions. As such, they qualify as ‘public officers’ pursuant to N.C. Gen. Stat. § 14-223.”).

Our General Assembly granted certain private universities the power to create campus police agencies through the enactment of Chapter 74G, the Campus Police Act. N.C. Gen. Stat. §§ 74G-1 to 13 (2013). “As part of the Campus Police Program, the Attorney General is given the authority to certify a private, nonprofit institution of higher education . . . as a campus police agency and to commission an individual as a campus police officer.” N.C.G.S. § 74G-2(a). “The principal State power conferred on campus police by this Chapter is the power of arrest[.]” N.C.G.S. § 74G-2(b)(6). “In exercising the power of arrest, these officers apply standards established by State and federal law only[.]” N.C.G.S. § 74G-2(b)(8). “Campus police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions” on campus and other property as allowed by the Campus Police Act. N.C.G.S. § 74G-6(b).

It is clear that campus police such as Officers Carter and Liberto, like municipal police officers, act pursuant to authority granted by our General Assembly, and that their duties involve “the exercise of some portion of the sovereign power.” *Hord*, 264 N.C. at 155, 141 S.E.2d at 245. We hold that Officers Carter and Liberto are entitled to public official immunity for their acts in furtherance of their official duties so long as those acts were not corrupt, malicious, or outside of and beyond the scope of their duties. *Clayton*, 153 N.C. App. at 492, 570 S.E.2d at 256.

III.

[2] Plaintiff first contends there existed “genuine issues of material fact such that summary judgment was improper.” All three of Plaintiff’s claims were for wrongful death. Specifically, Plaintiff argues:

A genuine issue of fact clearly exists here, where one witness is claiming that Mr. Dorsey had a hold of Officer Carter’s gun throughout the entire duration of the struggle, which was said to last *more than three minutes*, and where several other witnesses, those who were in close proximity to the events, testified that Mr. Dorsey *did not, at any time*, reach for or grab Officer Carter’s gun. The

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contradictory nature of the testimony of these witnesses is simply too glaring.

Plaintiff contends in his brief that the deposition testimony of Mr. Pamplin, Duke security guard Mark Golby, and Christine Locklear support the above argument. However, none of these witnesses testified that: “[Mr.] Dorsey *did not, at any time*, reach for or grab Officer Carter’s gun.” None of these witnesses testified in any manner to even a suspicion that Mr. Dorsey never grabbed Officer Carter’s gun. These witnesses testified that, from where they were located during the incident, they could not see Mr. Dorsey’s hands or Officer Carter’s weapon. Because they could not see what was happening with Officer Carter’s weapon during the struggle, they could not honestly state that they ever saw Mr. Dorsey grab Officer Carter’s weapon. They did, however, provide the following testimony.

Mr. Pamplin testified, *inter alia*, that during the several-minute struggle, he heard the officers yell “[s]top resisting[.]” heard Officer Carter say: “He has my gun[.]” saw Officer Carter and Mr. Dorsey struggling both standing up and on the ground and heard the officers repeatedly command Mr. Dorsey to: “Let go of the gun; let go of the gun.” When Mr. Pamplin was asked if he had “any reason to doubt that Mr. Dorsey was holding the gun,” he answered: “No.” When asked if he thought Mr. Dorsey did grab Officer Carter’s weapon, he answered: “Yes.” Mr. Pamplin’s testimony was generally consistent with that of both Officer Carter and Officer Liberto. This testimony is directly contrary to the following statement made by Plaintiff in his brief: “[Mr.] Pamplin testified that . . . Officer Carter yelled to Officer Liberto that Mr. Dorsey had a hold of Officer Carter’s weapon, *although [Mr.] Pamplin denied that Mr. Dorsey ever actually had a hold of Officer Carter’s gun.* (Pamplin Dep., p. 45).” (Emphasis added). Nowhere on page forty-five—or anywhere else in Mr. Pamplin’s deposition—does he testify that Mr. Dorsey never “had a hold” of Officer Carter’s weapon.

In his deposition, Duke security guard Mark Golby (“Mr. Golby”), testified as follows:

Q. Okay. You gave some testimony in which you said you never saw [Mr.] Dorsey’s hands on the gun; you never saw those sorts of things. From [where] you were standing, you were not able to see [Officer] Carter’s gun, were you?

A. No.

Q. And you were not able to see [Mr.] Dorsey’s hands or [Officer] Carter’s hands at that time, were you?

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A. No, I couldn't see.

Q. So when you're saying you never saw this, what you're really saying is you couldn't see it?

A. Right.

Mr. Golby further testified that, during the struggle, Officer Carter said Mr. Dorsey had a hold of Officer Carter's weapon, that Officer Liberto told Mr. Dorsey several times to let go of the weapon, and that Officer Liberto finally told Mr. Dorsey that if he did not release the weapon, Officer Liberto would shoot him. Nowhere did Mr. Golby indicate that Mr. Dorsey did not reach for or grab Officer Carter's weapon. Mr. Golby's deposition testimony is generally consistent with that of both Officer Carter and Officer Liberto.

Christine Locklear testified she saw the officers talking to Mr. Dorsey, but did not hear what was said. She saw them begin to scuffle and saw Mr. Dorsey and Officer Carter fall to the ground. She then went inside the hospital, and was inside when the shot was fired. As she was about to enter the hospital, immediately before she heard the shot, she "heard somebody say 'he's got his hands on the [weapon.]'" At Christine Locklear's deposition, when asked, she agreed she did not "know whether or not Mr. Dorsey got his hand on the officer's weapon[,] " she "just didn't see that[,] . . . if when he fell, that was going on – if when he fell that Mr. Dorsey did reach for it, I did not see it. Honey, I got away from that." Christine Locklear did not say it did not happen. Plaintiff's attorney asked her if, when Mr. Dorsey and the officers were struggling on the ground, she thought "that Mr. Dorsey presented a serious risk of harm to the police officers?" She answered:

I did. . . . I thought he could have grabbed his gun. . . . I mean, it was like he got in a rage or something when they asked him. You know, or I assumed they asked him to leave the premises, and it was like he got in a rage and real angry, I mean, just because of the assumptions or whatever. He was real, real upset. He was really angry.

Christine Locklear testified that, immediately after the shooting, she heard people talking about what had just happened, and she heard people saying things like:

Yeah, that he did grab the Law's gun and that's the reason and I heard that – I assumed that the white man did hit him with the baton to get him off the Law but no way – I mean, it was said that he was beat with the baton, and he

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would not let go of the officer's gun that he had; so after [the officer] beat [him] so long and he wouldn't let go, that's when, I reckon, they drew the gun. And it was said that, you know, they told him to let go and he wouldn't and so he shot him.

Christine Locklear stated she didn't specifically remember if any of her family members said they saw Mr. Dorsey grab the gun. Nowhere in the testimony of Mr. Pamplin, Mr. Golby, or Christine Locklear did either of them state that Mr. Dorsey did not grab Officer Carter's weapon, or that they believed Mr. Dorsey never grabbed Officer Carter's weapon.

Multiple other witnesses testified by deposition that they did see Mr. Dorsey attempting to take Officer Carter's weapon from Officer Carter's holster. Alena Hull ("Ms. Hull") testified:

A And they went to fighting and stuff, and the black officer [Carter], he was down on the ground; but the white officer [Liberto], now, he had out his gun.

....

A And telling the boy [Mr. Dorsey] to give up – he kept telling the boy to give up because they were already fighting him and beating him and he never would give up, and the black Law and him, they went down to the ground; and he had his hand on the Law's pistol.

Q Okay. Who did?

A The guy that was shot.

....

Q Okay. When you saw that, did you think he [Mr. Dorsey] was trying to take [Officer Carter's] gun?

A Yes, sir because he was in a rage.

....

A My opinion, the black guy that was down on the ground and the one that was shot, the white officer had no other choice but to shoot him where he shot, being honest, because if he would have done anything else, he would have shot the other officer.

....

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A He was hitting him in his back, his head, [with what looked like a “blackjack”] and he never would turn loose.

It is true that a report made by SBI Special Agent B.S. Fleming following an on-site interview with Ms. Hull shortly after the incident does not include the same detail. According to Agent Fleming’s report, Ms. Hull told him “she heard someone scream that someone had a gun[,]” saw two officers fighting with a man, and saw a white officer with his weapon drawn. According to this report, Ms. Hull could not see what was happening with Officer Carter’s weapon or Mr. Dorsey’s hands.

Krecia Ann Brayboy (“Ms. Brayboy”) testified that Mr. Dorsey grabbed the black officer’s weapon with his right hand and she thought at that time the black officer “threw his hand on top of [Mr. Dorsey’s] hand trying to keep [Mr. Dorsey] from pulling [the officer’s weapon]; getting it out of [the holster].” Ms. Brayboy testified,

to me, if he would have fired anywhere else below the shoulders, the black officer would have gotten shot. . . . Truthfully, to be honest, I’m sorry for what happened, but the officer really had no other choice because if this man would have gotten this weapon unhooked, it would have been chaos there. There isn’t any telling who all would have been killed[.]

Ms. Brayboy heard the white officer saying: “Let it go, let it go. Let it go, let it go.” Further, according to Ms. Brayboy, Mr. Dorsey

just would not let that weapon go. . . . [t]hey could not get him to break that grip. . . . All I know is Mr. Dorsey had a grip of that man’s weapon and would not let go. They begged and begged and begged this man to let this weapon go and he wouldn’t.

Ms. Brayboy admitted she had withheld most of this information from the SBI agent who interviewed her on the night of the incident; instead, stating that she had been inside at the time and had not seen anything.

Charles Brayboy (“Mr. Brayboy”) testified that Mr. Dorsey grabbed Officer Carter’s weapon and would not let it go.

I don’t know how in the world [Officer Carter] held onto that guy and held his hand. The cop was telling him to let it go, man; let it go. . . . He begged him, man. He begged him to let it go, man. He tried his best. . . . He told him to let it go, man. He said let it go, man; let it go; let it go, man;

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let it go. He didn't want to do it, man. . . . I was scared if he got that gun out, man, there wasn't any telling what he might have done.

Mr. Brayboy testified he had withheld information from the original investigating officer, but, after thinking about the situation, he realized had it been his child who had been shot, he would have wanted to know why it happened.

Debbie Locklear first told investigators she saw the officers struggling with Mr. Dorsey, and heard them yelling, "put it down' and 'let it go' over and over again." She told investigators she did not see what was in Mr. Dorsey's hands. In her opinion, the officers "did what they had to do" because Mr. Dorsey "refused to surrender" and the officers were "in danger." In her deposition testimony, Debbie Locklear stated:

[Mr. Dorsey] was very, very – he was on something. This black guy, his eye balls were that big. They tussled. They fought. They tussled. I mean, they had a black – some kind of thing. I mean, they were just trying to make him – you know. When he got his hand on that gun – his gun was in the holster. The black guy got his hand on that gun and would not let that gun go, and when I gave this statement, I was throwing up. I was so disgusted. I was scared, crying, and everything else, and when you get in a state of mind like that there and you know when your life is on the line, too, your mind goes blank.

Plaintiff agrees that Mr. Dorsey and Officer Carter became engaged in a struggle; that Officer Liberto hit Mr. Dorsey multiple times with his fist and his standard issue baton; that Mr. Dorsey and Officer Carter fell to the ground, still locked in a struggle; and that Officer Liberto finally drew his service weapon and shot Mr. Dorsey in the head. Both officers testified that Mr. Dorsey grabbed Officer Carter's weapon and would not let it go. They both testified that Officer Liberto attempted to get Mr. Dorsey to release the weapon by hitting Mr. Dorsey with his fist. Officer Liberto testified when that did not work, he removed his baton and began hitting Mr. Dorsey with the baton, but that Mr. Dorsey still would not release Officer Carter's weapon. The officers testified that Officer Liberto repeatedly commanded Mr. Dorsey to let go of the weapon. According to both officers, after Officer Carter and Mr. Dorsey fell to the ground, Officer Carter called out that Mr. Dorsey was pulling on the weapon. Officer Carter testified that his weapon was pulled partially out of his holster. Officer Liberto testified that Officer Carter yelled

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that Mr. Dorsey was “getting [his] gun.” Both officers testified they believed Mr. Dorsey was an immediate threat because he was pulling on the weapon, would not release it, and might have gained control of it.

Plaintiff’s own expert, Francis Murphy (“Mr. Murphy”), testified he believed Mr. Dorsey grabbed Officer Carter’s weapon, though he believed it happened after Officer Liberto had hit Mr. Dorsey with his fists and the baton. Mr. Murphy also testified he believed the reason Officer Liberto shot Mr. Dorsey “was because he was inadequately trained. He didn’t know how to control the situation. He didn’t know how to break the situation up.” Mr. Murphy testified he didn’t believe Officer Liberto wanted to shoot Mr. Dorsey; his opinion was that the officers were trying to arrest Mr. Dorsey without legal justification and that, due to poor training, the officers used unnecessary force and Mr. Dorsey responded. When asked: “But once [attempts to subdue Mr. Dorsey] had failed and they got to this point where the deadly force appeared to be imminent to be used against them, that’s why [Officer Liberto] shot [Mr. Dorsey]?” Mr. Murphy replied: “Sure.”

Viewing the evidence in the light most favorable to Plaintiff, Plaintiff provided no evidence tending to show that Mr. Dorsey did not attempt to gain control of Officer Carter’s weapon. “At the summary judgment stage, plaintiffs cannot rely on the allegations of the complaint; rather, plaintiffs need to present specific facts to support their claim.” *Haynes v. B & B Realty Grp., LLC*, 179 N.C. App. 104, 109, 633 S.E.2d 691, 694 (2006) (citation omitted).

Our Supreme Court has long held:

It is axiomatic that every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense. True the right of a person to use force in resisting an illegal arrest is not unlimited. He may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty. And where excessive force is exerted, the person seeking to avoid arrest may be convicted of assault, or even of homicide if death ensues[.]

In applying this rule of law, this Court has engaged in the following analytical framework:

Since the initial arrest . . . [was] illegal, plaintiff was entitled to use a reasonable amount of force to resist.

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Under this analysis, if the amount of force used by plaintiff was unreasonable . . . , then the officers had probable cause to arrest him under G.S. § 14-33(b)(8) [the statute criminalizing an assault on a law enforcement or government officer].

Moreover, the General Assembly has also provided that an individual “is not justified in using a deadly weapon or deadly force to resist an arrest by a law-enforcement officer using reasonable force,” when the individual knows that it is a true law enforcement officer who is attempting to make the arrest. N.C. Gen. Stat. § 15A-401(f)(1) (2005).

State v. Branch, 194 N.C. App. 173, 177, 669 S.E.2d 18, 20-21 (2008) (citations omitted). This Court has applied the same analysis when reviewing detentions not amounting to arrest. *Id.* at 178, 669 S.E.2d at 21.

Assuming, *arguendo*, the officers had no legal basis to detain Mr. Dorsey, Mr. Dorsey was not justified to resort to deadly force in response to that detention. Once Mr. Dorsey grabbed Officer Carter’s weapon, he exceeded any “force as reasonably appear[ed] to be necessary to prevent the unlawful restraint of his liberty.” *Id.* at 177, 669 S.E.2d at 20. Mr. Dorsey’s response was excessive, and became unlawful. *Id.* at 177, 669 S.E.2d at 20-21. Had the officers managed to subdue Mr. Dorsey without the use of deadly force, they could have, and almost certainly would have, arrested Mr. Dorsey.

An officer may resort to the use of deadly force “[t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force[.]” N.C. Gen. Stat. § 15A-401(d)(2) (a) (2013). “This portion of the statute ‘was designed solely to codify and clarify those situations in which a police officer may use deadly force without fear of incurring criminal or civil liability.’” *Turner v. City of Greenville*, 197 N.C. App. 562, 567, 677 S.E.2d 480, 484 (2009) (citation omitted).

Although Plaintiff presented expert testimony in support of his claim that Mr. Dorsey’s hands were not on Officer Carter’s weapon at the time Officer Liberto shot Mr. Dorsey, “[a] public official can [only] be held individually liable if it is ‘prove[n] that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.’” *Clayton*, 153 N.C. App. at 492, 570 S.E.2d at 256 (citations omitted). John Eric Combs (“Mr. Combs”), an instructor for the North Carolina Justice Academy, testified concerning the required “subject control and arrest techniques lesson plan for law enforcement

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officers” in North Carolina. Mr. Combs testified he did not know if Mr. Dorsey’s hands were on the gun at the time Officer Liberto fired the shot, but it would not have changed his opinion that Officer Liberto’s use of deadly force was justified. Mr. Combs stated: “We specifically teach in the subject control arrest techniques training program that any attack that includes an attempt to disarm an officer is a deadly force attack.” Mr. Combs was asked: “So an officer would be entitled to counter that deadly force with the use of deadly force?” Mr. Combs responded: “Yes, sir.” Mr. Combs further opined: “As far as a situation where two officers are around, an assailant grabs an officer’s weapon, my suggestion at that point is for the other officer to do exactly what [Officer] Liberto did and use deadly force.”

Former SBI Agent Steven Carpenter testified that in his opinion:

Looking at all the depositions and stuff, and applying North Carolina’s General Statute 15a-401, they very, very early in this struggle had every reason in the world to believe [Mr. Dorsey] intended to take that gun and harm somebody. They were responsible for protecting a large number of citizens around them that night. . . . As a police officer they had a responsibility to protect those people, and, if anything, I don’t think they reacted quick enough to ensure that these people did not meet with serious injury or death.

We hold that the evidence, viewed in the light most favorable to Plaintiff, does not show that the acts of the officers leading to Mr. Dorsey’s death were “‘corrupt or malicious, or . . . outside of and beyond the scope of [their] duties.’” *Clayton*, 153 N.C. App. at 492, 570 S.E.2d at 256 (citations omitted). We affirm the grant of summary judgment in favor of Officer Carter and Officer Liberto on Plaintiff’s claims of wrongful death against the officers in their individual capacities.

[3] Plaintiff also argues the trial court erred in granting summary judgment on Plaintiff’s claim of false arrest. Plaintiff’s complaint did not contain a claim for false arrest. Plaintiff filed a motion for leave to file first amended complaint, adding a claim for false arrest, four days before the hearing on Defendants’ motion for summary judgment. The trial court heard Plaintiff’s motion after it had heard Defendants’ motion for summary judgment and, at the close of the hearing, stated: “I’m going to take the motion to amend the complaint, as well as the motion for summary judgment under advisement.” As Plaintiff acknowledges in his brief, “the [trial court] failed to rule on the motion to amend.”

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“[G]enerally, the failure to obtain a ruling on a motion presented to a trial court renders the argument raised in the motion unpreserved on appeal. *See* N.C.R. App. P. 10(a)(1) (2012).” *Dep’t of Transp. v. Webster*, ___ N.C. App. ___, ___, 751 S.E.2d 220, 223 (2013) *disc. review denied*, ___ N.C. ___, 755 S.E.2d 618 (2014). The present issue does not fall outside the general rule. Plaintiff has failed to preserve this argument for appellate review. *Id.*

Because of our holdings above, we do not reach Plaintiff’s argument concerning contributory negligence.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA ON RELATION OF CITY OF CHARLOTTE,
A MUNICIPAL CORPORATION, PLAINTIFF-APPELLEE

v.

HIDDEN VALLEY KINGS AKA HVK OR ICEE MONEY, WENDELL MCCAIN,
KEVIN FUNDERBURK AND CORDELL BLAIR, DEFENDANTS-APPELLANTS

No. COA14-72

Filed 17 June 2014

Appeal and Error—interlocutory orders and appeals—preliminary injunction—no substantial right

Defendant’s appeal from a preliminary injunction in a North Carolina Street Gang Nuisance Abatement Act case was dismissed. Defendant did not argue any substantial right that would be irrevocably lost if the preliminary injunction was not immediately reviewed.

Appeal by Defendant Kevin Funderburk from preliminary injunction entered 26 August 2013 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 3 June 2014.

Charlotte-Mecklenburg Police Department, by Assistant City Attorney Richard R. Perlungher and Deputy City Attorney Mark H. Newbold, for Plaintiff-Appellee.

Arnold & Smith, PLLC, by L. Bree Laughrun and Kyle Frost, for Defendant Kevin Funderburk.

STATE EX REL. CITY OF CHARLOTTE v. HIDDEN VALLEY KINGS

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McGEE, Judge.

The State of North Carolina, on relation of the City of Charlotte, (“Plaintiff”) filed a complaint and motion for preliminary and permanent injunction against Hidden Valley Kings, also known as HVK or ICEE Money, Wendell McCain, Kevin Funderburk, and Cordell Blair (together, “Defendants”) on 12 August 2013. In its complaint, Plaintiff cited N.C. Gen. Stat. §§ 14-50.41 et seq., the “North Carolina Street Gang Nuisance Abatement Act” (hereinafter “the Act”) and N.C. Gen. Stat. § 19-2.1, which provides for an action for abatement of a nuisance. The Act provides: (1) that a gang that regularly engages in criminal street gang activities constitutes a public nuisance, (2) that a trial court may enter an order enjoining a defendant from engaging in criminal street gang activity, and (3) that a trial court may “impose other reasonable requirements to prevent the defendant or a gang from engaging in future criminal street gang activities.” N.C. Gen. Stat. § 14-50.43(b),(c) (2013).

The trial court held a hearing on Plaintiff’s motion for preliminary injunction on 22 August 2013. Counsel for both Plaintiff and for Defendant Kevin Funderburk (hereinafter “Defendant Funderburk”) were present and gave arguments to the trial court. The trial court found that Plaintiff had “no adequate remedy at law to prohibit” Defendants from “associating together for the purpose of regularly engaging in criminal street gang activity.” The trial court further found that, without a preliminary injunction, Plaintiff and citizens and residents of the Hidden Valley Neighborhood and greater Charlotte area would “suffer irreparable harm from the criminal street gang activity regularly engaged in by” Defendants. The trial court also found that Plaintiff “demonstrated a likelihood of success on the merits of the case.”

The trial court ordered that Defendants were restrained and enjoined from the following:

- a. Engaging in criminal street gang activity as defined in North Carolina Gen. Stat. § 14-50.16(c);
- b. Driving, standing, sitting, walking, gathering or appearing, anywhere in public view or any place accessible to the public within Mecklenburg County, with any member of the HVK gang that he or she knows to be a member of the HVK gang, including but not limited to those members identified by name in this Preliminary Injunction, except when directly traveling to or from the following locations and where their presence is required: (1) inside a school or

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other educational facility where they are attending a class or on school business; (2) inside a church or other place of worship; (3) at a location where they are actively engaged in a legitimate business, employment, trade, training, profession or occupation; or, (4) at a location where they are attending counseling sessions or community meetings at community centers or other established organizations;

c. Confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting or battering any person that he or she knows to be a witness to any criminal street gang activity of HVK, to be a victim of any criminal street gang activity of HVK, or to have complained about any criminal street gang activity of HVK;

d. Possessing any firearm, imitation firearm, ammunition, or deadly weapon, knowingly remaining in the presence of anyone who is in possession of such firearm, imitation firearm, ammunition or illegal weapon, or knowingly remaining in the presence of such firearm, imitation firearm, ammunition or illegal weapon, anywhere in public view or any place accessible to the public;

e. Knowingly remaining in the presence of anyone who is in possession of any illegal drugs, narcotics or paraphernalia;

f. Recruiting, soliciting, enticing, or encouraging individuals to join HVK or to perform any acts that will support HVK or its members;

g. Taking any action that prevents a member from leaving HVK, including, but not limited to, threatening or intimidating by any means, the person attempting to leave HVK or any member of that person's family or friends;

h. Participating in the unlawful possession, use or sale of any controlled substance as defined by state or federal law or the possession or use of any drug paraphernalia; and,

i. Being present on or in any private property within Mecklenburg County not open to the general public with any person that he or she knows to be a member of the HVK gang, including, but not limited to, those members identified by name in this Preliminary Injunction, except when the members are relatives of the same family and

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are on or in private property of a family member they share in common.

Defendant Funderburk appeals from the entry of the above preliminary injunction.

We first address whether this appeal must be dismissed as premature. “A preliminary injunction is an interlocutory order.” *Looney v. Wilson*, 97 N.C. App. 304, 307, 388 S.E.2d 142, 144 (1990). There is no immediate right of appeal from an interlocutory order unless the order affects a substantial right. N.C. Gen. Stat. §§ 1-277, 7A-27(b)(3) (2013).

Issuance “of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order ‘escape appellate review before final judgment.’” *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (quoting *State v. School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 (1980)). “If no such right is endangered, the appeal cannot be maintained.” *School*, 299 N.C. at 358, 261 S.E.2d at 913. In *School*, the defendants offered “no evidence of any substantial right which will be irrevocably lost if the state’s entitlement to the preliminary injunction is not now reviewed.” *Id.* The order in *School* restrained the defendants “from operating day-care centers without complying with the licensing requirements of the [Day-Care Facilities] Act.” *Id.* Our Supreme Court held that the defendants’ contention that “compliance with the Act’s requirements violates their constitutionally guaranteed religious freedoms goes to the heart of their legal challenge to the application of the Act itself and must await resolution at the final hearing when all the facts upon which such resolution must rest can be fully developed.” *Id.*

Our Supreme Court further stated that its “refusal to allow [the] defendants’ appeal is not a surrender to technical requirements of finality.” *Id.* “The statutes and rules governing appellate review are more than procedural niceties. They are designed to streamline the judicial process, to forestall delay rather than engender it.” *Id.* “There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.” *Id.* (quoting *Veasey v. Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950)); see also *Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 586 S.E.2d 548 (2003).

In the present case, Defendant Funderburk offered in his brief that there is “no evidence of any substantial right which will be irrevocably lost if the state’s entitlement to the preliminary injunction is not

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now reviewed.” *School*, 299 N.C. at 358, 261 S.E.2d at 913. As discussed above, the “rule forbidding interlocutory appeals is designed to promote judicial economy by eliminating the unnecessary delay and expense of repeated fragmentary appeals and by preserving the entire case for determination in a single appeal from a final judgment.” *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 146 (1982). “Additionally, appellate courts are almost always better able to decide the legal issues when they have before them a fully developed record.” *Id.*

The record before this Court contains only a brief transcript of the short hearing before the trial court and an affidavit from a detective with the Charlotte-Mecklenburg Police Department Gang Unit. Defendant Funderburk offered no evidence during the hearing before the trial court. Defendant Funderburk has not argued any substantial right that will be irrevocably lost if the preliminary injunction is not now reviewed, and his appeal is dismissed.

Dismissed.

Judges ELMORE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
ELWOOD WARREN COLLINS

No. COA13-1043

Filed 17 June 2014

1. Jurisdiction—subject matter—order—post-conviction DNA testing—entered out of session—without consent of parties

The trial court did not lack subject matter jurisdiction to enter an order denying defendant’s motion for post-conviction DNA testing. Pursuant to N.C.G.S. § 7A-47.1, a trial court may exercise in chambers jurisdiction in a nonjury matter arising in his or her district to enter an order out of session and without the consent of the parties.

2. Criminal Law—post-conviction proceedings—motion for DNA testing—no newer and more accurate tests

The trial court did not err by denying defendant’s motion for post-conviction DNA testing under N.C.G.S. § 15A-269. Defendant

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failed to adequately establish that newer and more accurate tests would identify the perpetrator or contradict prior test results.

Appeal by Defendant from Order entered 11 April 2013 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 22 January 2014.

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

Richard J. Costanza for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

This case arises from Defendant Elwood Warren Collins's motion for post-conviction DNA testing. On 22 October 2003, Defendant was indicted for first-degree murder in the death of Christina Lee. On 6 May 2005, Defendant pled guilty to second-degree murder pursuant to the United States Supreme Court's opinion in *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970) (determining that a court may accept a plea of guilty to second-degree murder when the State has strong evidence of guilt of first-degree murder even though the defendant claims that he is innocent, if the defendant, represented by competent counsel, intelligently concludes that he should plead guilty to second-degree murder rather than be tried for first-degree murder). As a result, the trial court sentenced Defendant in the presumptive range to an active term of 157 to 198 months in prison.

More than four years later, on 28 December 2009, Defendant filed a *pro se* motion seeking post-conviction DNA testing on certain items of evidence related to Lee's death. The trial court appointed counsel to represent Defendant on 10 February 2010, and Defendant filed an amended affidavit in support of his motion for genetic testing on 24 March 2010. The State filed an answer contesting Defendant's motion on 7 December 2012.¹ A proceeding on the motion was held on 12 March 2013, and counsel appeared for both sides. According to the trial court, the proceeding was conducted to determine "whether . . . [Defendant's] motion meets the threshold requirements of the statute, and if so, record a hearing [at]

1. The record contains no explanation for the remarkable delay in the filing of the State's answer.

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which time the State and [D]efendant will be allowed to present further evidence in support of their positions.”

The parties have stipulated that they appeared before the trial court two days later, on 14 March 2013, “to address the request for post[-] conviction DNA testing.” According to this stipulation, “[t]he parties agreed that [the trial court] could make a ruling based on the motion itself and the State’s response.” That afternoon, the trial court contacted counsel for the parties by e-mail, indicating that Defendant’s motion was denied and stating that

Defendant has failed to show how the DNA material to be tested is material to his defense or what th[e] ‘newer and more accurate testing’ consists of or how said results would be significantly more accurate and probative of the identity of the perpetrator. The mere mouthing of these conclusory statements, absent more, [is] insufficient to carry . . . [D]efendant’s burden on this issue.

The e-mail directed the State to draft an order denying the motion, which would be circulated to defense counsel and then executed by the trial court. The court entered its written order denying the motion on 11 April 2013. Defendant appeals.

Discussion

On appeal, Defendant argues (1) that the trial court’s 11 April 2013 order is null and void for lack of jurisdiction, or, alternatively, (2) that the trial court erred in denying Defendant’s motion for post-conviction DNA testing. We disagree.

I. Jurisdiction

Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court’s having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened.

McKoy v. McKoy, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citations and internal quotation marks omitted; italics added).

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[1] Defendant argues that the trial court's 11 April 2013 order is null and void for lack of jurisdiction because it was filed out of session and without his consent. In making this argument, Defendant points out that the proceedings on 12 and 14 March 2013 were held during the 11 March 2013 Criminal Session of Craven County Superior Court, which concluded well before the trial court filed its 11 April 2013 written order.² For support, Defendant cites our Supreme Court's opinion in *State v. Trent*, which held that:

[A]n order of the superior court, in a criminal case, must be entered during the term, during the session, in the county[,] and in the judicial district where the hearing was held.³ Absent consent of the parties, an order entered in violation of these requirements is null and void and without legal effect.

359 N.C. 583, 585, 614 S.E.2d 498, 499 (2005). We are not persuaded by Defendant's argument.

In *Trent*, the defendant was charged with and convicted of robbery with a dangerous weapon. *Id.* at 584, 614 S.E.2d at 499. Before trial, the defendant filed two motions to suppress. *Id.* A hearing on the motions was held on 11 October 2001 and continued to 17 January 2002. *Id.* The trial court declined to rule at the end of the January hearing and announced its determination seven months later, in the following term, denying the defendant's motions. *Id.* The defendant appealed, and our Supreme Court granted a new trial because the court's order was "null and void since it was entered out of term and out of session." *Id.* at 586, 614 S.E.2d at 500.

2. For purposes of addressing Defendant's argument, we take judicial notice of the Division II calendar of superior courts for the spring 2013 term, available at <http://www.nccourts.org/Courts/CRS/Calendars/Documents/spring2013-statewide.pdf>. See generally *Baker v. Varser*, 239 N.C. 180, 186, 79 S.E.2d 757, 761-62 (1954) (taking judicial notice of the assignment of trial judges to hold court). According to the information in that calendar, Judge Alford was assigned to Superior Court Division II, judicial district 3B. The spring term was set to begin January 7 and end July 1. Beginning 11 March 2013, Judge Alford was scheduled to hold the criminal and civil sessions of Craven County Superior Court, which were set to last for one week. Judge Alford was also scheduled to preside over the 18 March 2013 civil and criminal sessions of Craven County Superior Court, which were set to last for another week. Craven County Superior Court was not in session during the week of 8 April 2013, and Judge Alford was assigned instead to preside over the criminal and civil sessions of Carteret County Superior Court.

3. "The use of 'term' has come to refer to the typical six-month assignment of superior court judges, and 'session' to the typical one-week assignments within the term." *Capital Outdoor Advertising, Inc. v. City of Raleigh*, 337 N.C. 150, 154 n. 1, 446 S.E.2d 289, 291 n. 1 (1994).

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In so holding, the *Trent* Court relied on its previous opinion in *State v. Boone*, 310 N.C. 284, 287–88, 311 S.E.2d 552, 555 (1984). The defendant in *Boone* was charged with felonious manufacturing of a controlled substance and felonious possession of more than one ounce of marijuana. *Id.* at 284–85, 311 S.E.2d at 553. He was convicted of the latter. *Id.* at 285, 311 S.E.2d at 553. Prior to trial, he moved to suppress the marijuana in a motion heard on 16 and 18 June 1981. *Id.* at 286, 311 S.E.2d at 554. The trial court denied the motion by order signed in the following session, on 25 June 1981. Because the order was signed outside the session in which the motion was heard, our Supreme Court determined that the defendant was entitled to a new trial. *Id.* at 286–87, 311 S.E.2d at 554–55. In so holding, the Court cited the following general rule:

Judgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested.

Id. at 287, 311 S.E.2d at 555 (citation and brackets omitted) (noting that this rule has been consistently applied in both criminal and civil cases).

In the time between the Court's opinions in *Boone* and *Trent*, our Supreme Court authored a third opinion, *Capital Outdoor Advertising, Inc. v. City of Raleigh*, 337 N.C. at 159, 446 S.E.2d at 294 [hereinafter *Capital Outdoor*]. In *Capital Outdoor*, the plaintiffs filed a complaint challenging the constitutionality of a city ordinance. *Id.* at 153, 446 S.E.2d at 291. The defendant moved to dismiss the complaint under Rule 12(b)(6), and the motion was heard on 29 October 1991, during the 28 October 1991 session. *Id.* at 154, 446 S.E.2d at 292. The trial court granted the motion on 4 November 1991, after the expiration of the previous session. *Id.* Relying on the “ample power” of the legislature “to establish, define[,] and limit the jurisdiction of the Superior Courts,” the Supreme Court affirmed the trial court's out-of-session order under section 7A-47.1 and Rule 6(c) of the Rules of Civil Procedure as “two separate statutes authorizing the execution and entry of the dismissal order of the trial judge out of session . . .” *Id.* at 155–59, 446 S.E.2d at 292–94. *Capital Outdoor* is controlling precedent in this case.

As a preliminary matter, we note the apparent contradiction in these three cases. *Boone* stated that orders entered out of session and out of

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term are invalid based on absence of the trial court's jurisdiction and held that the out-of-session order in that case was invalid for the same reason. *Boone*, 310 N.C. at 287–88, 311 S.E.2d at 555. *Capital Outdoor* implicitly overruled *Boone* as it pertains to orders entered out of session. *Capital Outdoor*, 337 N.C. at 158, 446 S.E.2d at 294. *Trent* later applied *Boone* to determine that the trial court erred by entering its order “out of term and out of session.”⁴ Though the language in *Trent* suggests that it was reinstating *Boone* in its entirety, the holding in that case is limited to an order entered out of term. *Trent*, 359 N.C. at 586, 614 S.E.2d at 500.

Relying on established principles of stare decisis, we read these cases together to the extent that they represent a reasonable, practicable, and stable interpretation of the law. See *Bulova Watch Co. v. Brand Distributions of N. Wilkesboro, Inc.*, 285 N.C. 467, 473, 206 S.E.2d 141, 145–46 (1974) (“The law must be characterized by stability if [people] are to resort to it for rules of conduct. These considerations have brought forth the salutary doctrine of *stare decisis* which proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases.”). Applying those principles to *Boone*, *Capital Outdoor*, and *Trent*, the resulting rule is that the superior court is divested of jurisdiction when it issues an out-of-term order substantially affecting the rights of the parties unless that order is issued with the consent of the parties. If the court issues an order out of session, however, the court is not divested of jurisdiction as long as either section 7A-47.1 or Rule 6(c) is applicable. See *Trent*, 359 N.C. at 586, 614 S.E.2d at 500; *Capital Outdoor*, 337 N.C. at 158, 446 S.E.2d at 294.

Rule 6(c) has no bearing on this case. It is a rule of civil procedure, and this is a criminal matter. However, section 7A-47.1 is a general rule of judicial procedure and applies to both criminal and civil cases. See N.C. Gen. Stat. § 7A-2(1) (stating that the purpose of Chapter 7A is to create a place for “all statutes concerning the organization, jurisdiction[,] and administration of each division of the General Court of Justice”). In *Capital Outdoor*, the Court stated that section 7A-47.1 and Rule 6(c) are separate authorities for an order entered out of session. Therefore, either may be used to establish the trial court's jurisdiction, if applicable. Here, section 7A-47.1 applies to validate the trial court's out-of-session order.

4. The *Trent* Court was clearly aware of the *Capital Outdoor* opinion, citing it for the definition of “term” and “session.” *Trent*, 359 N.C. at 585, 614 S.E.2d at 499.

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Section 7A-47.1, entitled “[j]urisdiction in vacation or in session,” provides as follows:

In any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election. Any regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a)⁵ and any special superior court judge residing in the district or set of districts and the judge regularly presiding over the courts of the district or set of districts have concurrent jurisdiction throughout the district or set of districts in all matters and proceedings in which the superior court has jurisdiction out of session; provided, that in all matters and proceedings not requiring a jury or in which a jury is waived, any regular resident superior court judge of the district or set of districts and any special superior court judge residing in the district or set of districts shall have concurrent jurisdiction throughout the district or set of districts with the judge holding the courts of the district or set of districts and any such regular or special superior court judge, in the exercise of such concurrent jurisdiction, may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court.

N.C. Gen. Stat. § 7A-47.1 (2013) (re-codified in 1969 from N.C. Gen. Stat. § 7-65).

“[I]n vacation” jurisdiction, as described in section 7A-47.1, arises from the trial court’s

general jurisdiction of all “in chambers” matters arising in the district. The general “vacation” or “in chambers” jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district and it is never dependent upon and does not arise out of the fact that [the judge] is at the time presiding over a designated term of court or in a particular county. As to [the judge], it is limited, ordinarily, to the district to which he is assigned by statute.

5. “Regular resident superior court judge of the district or set of districts” means a regular superior court judge who is a resident judge of any of the superior court districts established under section 7A-41. N.C. Gen. Stat. § 7A-41.1 (2013).

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Baker v. Varser, 239 N.C. 180, 188, 79 S.E.2d 757, 763 (1954) (citations and internal quotation marks omitted). The *Baker* court’s description is based on a prior version of section 7A-47.1, then-codified as section 7-65. *See Baker*, 239 N.C. at 187–88, 79 S.E.2d at 763; *see also* 1969 N.C. Sess. Laws 1377, ch. 1190, sec. 47 (re-codifying section 7-65 as section 7A-47.1). Section 7-65 is substantially similar to section 7A-47.1 except that the word “session,” as used in 7A-47.1, was written as “term” or “term time” in section 7-65. *See Baker*, 239 N.C. at 187–88, 79 S.E.2d at 763. The change from “term” and “term time” to “session” tracks the 1962 amendments to the North Carolina Constitution, which “changed the word ‘term’ to ‘session’ when referring to the period of time during which superior court judges are assigned to court” *See Capital Outdoor*, 337 N.C. at 154 n.1, 446 S.E.2d at 291 n.1; *see also* N.C. Const. art. IV, § 9(2). This change comports with the rule discussed above, *i.e.*, that in vacation jurisdiction applies only to orders entered out of session, not those entered out of term.

We note that *Baker*’s description of in chambers jurisdiction, stating that the exercise of such jurisdiction is not dependent on the judge’s presence in the county, conflicts in part with our opinion in *House of Style Furniture Corp. v. Scronce*, where we cited the

uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the [s]uperior [c]ourt, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending.

33 N.C. App. 365, 369, 235 S.E.2d 258, 260 (1977) (citing *Bisnar v. Suttlemyre*, 193 N.C. 711, 138 S.E. 1 (1927)) [hereinafter *House of Style*]. Nonetheless, *House of Style* is not controlling in this case.

The plaintiffs in *House of Style* filed their complaint in Alexander County on 24 September 1975. *Id.* at 366, 235 S.E.2d at 259. The following year, the defendants moved to dismiss the plaintiff’s claims and for entry of default judgment. *Id.* That motion was heard in Iredell County before a judge of judicial district 22, which included both Alexander County and Iredell County. *Id.* Six days after the hearing, the trial court filed its order dismissing the plaintiffs’ claims and entering default judgment.⁶

6. Neither our opinion in *House of Style* nor the record on file for that case specifies whether the trial court filed its order in Alexander County or Iredell County. *See id.*; 909 N.C. App. Records and Briefs No. 7622SC901, 59–65 (1976).

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Id. at 367, 235 S.E.2d at 259. On appeal, we vacated the trial court's order and judgment because we could not find any statute authorizing the trial judge to conduct a hearing out of county. *Id.* at 369, 235 S.E.2d at 261 (“[The parties] did not consent for the motion to be heard in Iredell County[,] and our research fails to disclose any statute authorizing [the judge]’s action in that county.”).

Though *House of Style* was filed seventeen years after *Baker*, it does not discuss that opinion. *See id.* In addition, neither *House of Style* nor its cited authority, *Bisnar*, discusses section 7A-47.1 or its predecessor, section 7-65. *See id.*; *see also Bisnar*, 193 N.C. at 711, 138 S.E. at 1. Instead, the *House of Style* Court relies on the “uniform holding” described above. *See House of Style*, 33 N.C. App. at 369, 235 S.E.2d at 260. This Court is bound by *House of Style* as it pertains to orders in criminal cases arising from hearings occurring out of county.⁷ *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989). *House of Style* provides no direction, however, on the validity of an order in a criminal case arising from a valid hearing, but entered while the judge is sitting in another county. *See House of Style*, 33 N.C. App. at 369, 235 S.E.2d at 260. Therefore, pursuant to our discussion, *supra*, we conclude that section 7A-47.1 constitutes statutory authority to justify an order entered in a criminal case while the judge who heard the case in the proper county is sitting in another county within the district when the order is entered. *See* N.C. Gen. Stat. § 7A-47.1. As a result, *House of Style* has no impact on this case because Defendant’s motion was properly heard in Craven County. Accordingly, Judge Alford’s out-of-session order is proper even though it was issued while he was sitting in Carteret County.

Finally, we point out that in chambers jurisdiction under section 7A-47.1 does not require the consent of the parties. *E-B Grain Co. v. Denton*, 73 N.C. App. 14, 24, 325 S.E.2d 522, 528–29 (1985) (“We believe [the trial court judge] clearly had authority under [section] 7A-47.1 to hear [the] plaintiff’s motion . . . , even though [the] defendant’s counsel objected. To interpret the statute [according to Defendant’s argument] would mean that no superior court judge could hear any matter, whether

7. Rule 7(b) of the North Carolina Rules of Civil Procedure was amended in 2005 to allow motions heard out of county. 2005 N.C. Sess. L. 163, H.B. 514, section 1. The wording was changed in 2011 to specifically allow motions “in a civil action in a county that is a part of a multicounty judicial district” to be heard in another county “which is part of that same judicial district with the permission of the senior resident superior court judge of that district” 2011 N.C. Sess. Laws 317, S.B. 586, section 1. Therefore, our opinion in *House of Style* is no longer applicable in civil cases as long as the senior resident superior court judge permits the case to be heard out of county. *See* N.C.R. Civ. P. 7(b)(4) (2013).

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in or out of session, without ‘all the parties uniting in the proceedings.’”). Therefore, as provided by section 7A-47.1, a trial court may exercise in chambers jurisdiction in a nonjury matter arising in his or her district to enter an order out of session and without the consent of the parties. *See* N.C. Gen. Stat. § 7A-47.1; *Capital Outdoor*, 337 N.C. at 158, 446 S.E.2d at 294.

Here, there is no evidence in the record to indicate that the parties consented to the trial court’s entry of its 11 April 2013 order out of session. Nonetheless, Defendant’s motion for post-conviction DNA testing did not require the presence of a jury, the hearing on the motion was conducted while Judge Alford was sitting in Craven County Superior Court, and Judge Alford remained in District II at the time he filed the written order. For these reasons, section 7A-47.1 operated to allow the trial court to issue this out-of-session order. Accordingly, Defendant’s first argument is overruled.

II. Defendant’s Motion for Post-Conviction DNA Testing

The standard of review for the denial of a motion for post-conviction DNA testing is

analogous to the standard of review for a motion for appropriate relief. Findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court’s conclusions of law are reviewed *de novo*.

State v. Gardner, __ N.C. App. __, __, 742 S.E.2d 352, 354 (2013). At the hearing on a motion for appropriate relief, the defendant has “the burden . . . of establishing the facts essential to his claim by a preponderance of the evidence.” *State v. Hardison*, 143 N.C. App. 114, 120, 545 S.E.2d 233, 237 (2001) (citation and internal quotation marks omitted). A conclusory statement, alone, is not sufficient to satisfy this burden. *Gardner*, __ N.C. App. at __, 742 S.E.2d at 356 (stating that the defendant’s burden of showing materiality in a motion for post-conviction DNA testing “requires more than [a] conclusory statement that the ability to conduct the requested DNA testing is material to [his] defense”) (citations, internal quotation marks, and brackets omitted).

[2] On appeal, Defendant argues that the trial court’s order should be reversed because his motion and amended affidavit, together, demonstrated the necessary conditions for the court to grant his motion for post-conviction DNA testing under section 15A-269. In response, the State asserts that section 15A-269 is not applicable in this case.

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Alternatively, the State contends that Defendant failed to show how DNA testing was material to his case and failed to demonstrate that there are “newer and more accurate tests that would be significantly more accurate and probative of the identity of the [true] perpetrator.” Finally, the State argues that — even if the allegations in the affidavit support a finding of materiality — Defendant waived his right to test any evidence before a jury by entering an *Alford* guilty plea. We affirm the trial court’s order on grounds that Defendant failed to adequately establish that newer and more accurate tests would identify the perpetrator or contradict prior test results. We do not address the State’s argument that Defendant is not entitled to post-conviction DNA testing because he entered an *Alford* plea.

(1) Background

Under section 15A-269,

(a) A defendant may make a motion . . . for performance of DNA testing . . . if the biological evidence meets all of the following conditions:

(1) [The evidence is] material to the defendant’s defense.

(2) [The evidence is] related to the investigation or prosecution that resulted in the judgment.

(3) [The evidence meets] either of the following conditions:

a. It was not DNA tested previously.

b. It was tested previously, but the requested DNA test would provide results that are *significantly more accurate* and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(b) The court shall grant the motion for DNA testing . . . upon its determination that:

(1) The conditions set forth in . . . subsection (a) . . . have been met;

(2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable

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probability that the verdict would have been more favorable to the defendant; and

(3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269 (2013) (emphasis added).

Given the allegations in Defendant’s motion and amended affidavit,⁸ the trial court made the following pertinent findings of fact and conclusion of law:

10. . . . [D]efendant has failed stated [sic] how . . . additional DNA testing would be material to his defense. . . . [D]efendant merely makes a conclusory statement.

11. . . . [D]efendant has failed to show how “newer and more accurate testing” [w]ould be significantly more accurate and probative of the identity of the perpetrator.

. . . .

. . . [D]efendant has failed to meet all requirements of § 15A-269.

On appeal, Defendant concedes that the statements in his *pro se* motion are insufficient to justify post-conviction DNA testing under section 15A-269, but argues that the additional statements in his amended affidavit sufficiently “discuss [his] reasoning for entering his *Alford* plea, the DNA mixture that did not exclude or isolate him, his cohabitation with the victim, and his understanding that more accurate methods of DNA testing are now available” to justify relief under section 15A-269. We disagree.

(2) *Applicability of Section 15A-269*

The State argues that section 15A-269 is not applicable in this case because Defendant seeks testing to show a *lack* of biological evidence. For support, Defendant cites to our opinion in *State v. Brown*, where we commented that section 15A-269 “provides for testing of ‘biological evidence’ and not evidence in general.” 170 N.C. App. 601, 609, 613 S.E.2d 284, 289 (2005), *superseded by statute on other grounds*,

8. Though the State does not contest the propriety of Defendant’s amended affidavit, we note that amendments to the analogous motion for appropriate relief are permissible under N.C. Gen. Stat. § 15A-1415. Thus, amendments to a motion for post-conviction DNA testing are similarly permissible pursuant to standards prescribed in section 15A-1415.

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State v. Norman, 202 N.C. App. 329, 332–33, 688 S.E.2d 512, 515 (2010). This argument is without merit.

In *Brown*, the defendant, a former assistant principal, was indicted for and convicted of attempted second-degree rape of a former student. *Id.* at 602, 613 S.E.2d at 285. Defendant did not appeal that conviction. *Id.* at 603, 613 S.E.2d at 285. As a result, evidence in the form of a torn blouse and pants was turned over to the local police department. *Id.* Five months later, Defendant filed a motion for post-conviction DNA testing of a torn blouse, a pair of pants, an undergarment, nail clippings and hair samples, and other items related to his conviction. *Id.* at 603, 609, 613 S.E.2d at 285, 288–89. Despite this motion, the blouse and jeans were destroyed after the victim indicated that she did not want them returned. *Id.* The other evidence had never been collected and was not available for testing. *See id.* at 603–04, 613 S.E.2d at 286. One month later, the trial court denied the defendant’s motion because “no . . . testing could be conducted.” *Id.* at 603, 613 S.E.2d at 286.

On appeal, this Court declined to review the trial court’s decision because Article 13, which deals with the DNA database and databank, did not at that time include a provision for appellate review of an order denying post-conviction DNA testing.⁹ *Id.* at 607, 613 S.E.2d at 287. After concluding that we had no authority to review the defendant’s petition for writ of *certiorari*, we also declined to review the matter pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. *Id.* at 608, 613 S.E.2d at 288. In so holding, we explained that no manifest injustice was present in the case because the defendant was asking for testing to “show a lack of DNA evidence, thereby corroborating his testimony [, which denied the allegations made at trial].” *Id.* at 609, 613 S.E.2d at 288–89. Commenting that section 15A-269 did not apply when a defendant seeks to demonstrate a “lack of biological evidence” and noting that the defendant was only charged with *attempted* rape, not actual rape, we concluded that “the absence of DNA evidence would not necessarily exonerate [the] defendant.” *Id.* at 609, 613 S.E.2d at 289.

Unlike the defendant in *Brown*, Defendant here is seeking “[a] conclusive test on the biological and other samples taken into evidence in this matter.” He is not seeking to show a lack of DNA evidence. Accordingly, *Brown* does not operate to bar Defendant’s motion.

9. Appellate review of an order denying a defendant’s motion for DNA testing is now appealable as of right under section 15A-270.1 (2013).

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(3) Accuracy and Probative Value of Newer Tests

The State also argues that the trial court properly denied Defendant's motion because Defendant failed to demonstrate "how 'newer and more accurate testing' would be significantly more accurate and probative of the identity of the perpetrator." We agree.

In his *pro se* motion for post-conviction DNA testing, Defendant referenced discussions with "DNA [e]xperts," described a "new technique known as 'Touch DNA' that allows [f]or the amplification and analysis of very minute amounts [o]f cellular / DNA material," and alleged that the items sought to be tested "can now be subjected to newer and more accurate testing which would provide results that are significantly more accurate and probative of the identity of the perpetrator [o]r accomplice, or have a reasonable probability of . . . contradicting prior test results." In his amended affidavit, Defendant provided the following additional information:

7. It is my understanding that, since 2003 when this case was initiated, more accurate methods of DNA testing have been developed and put in place in forensic laboratories, and such methods would have a reasonable probability of contradicting the prior test results.
8. Had more accurate DNA testing methods excluded me as the perpetrator of this crime, the result of this case would have been different, inasmuch as I would not have entered an *Alford* guilty plea, but would have submitted the matter to a jury at trial.

These allegations do not establish that the requested DNA tests are "significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results" under section 15A-269(a)(3)(b).

As we noted in *State v. Foster*, a mere conclusory statement is insufficient to establish materiality. __ N.C. App. __, __, 729 S.E.2d 116, 120 (2012). Similarly, such a statement is insufficient to establish that a requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results. *See id.* Rather, the defendant must provide *specific reasons* that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or accomplice or that there is a

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reasonable probability of contradicting the previous test results. *See* N.C. Gen. Stat. § 15A-269.

In this case, Defendant's mere allegations that "newer and more accurate testing" methods exist, "which would provide results that are significantly more accurate and probative of the identity of the perpetrator [o]r accomplice, or have a reasonable probability of . . . contradicting prior test results" are incomplete and conclusory. Even though he named a new method of DNA testing, he provided no information about how this method is different from and more accurate than the type of DNA testing used in this case. Without more specific detail from Defendant or some other evidence, the trial court could not adequately determine whether additional testing would be significantly more accurate and probative or have a reasonable probability of contradicting past test results. For these reasons, we conclude that the court properly denied Defendant's motion for post-conviction DNA testing. Accordingly, Defendant's second argument is overruled, and the trial court's order is

AFFIRMED.

Judges STEELMAN and DAVIS concur.

STATE OF NORTH CAROLINA
v.
HOWARD JUNIOR EDGERTON

No. COA13-1235

Filed 17 June 2014

Domestic Violence—violating a protective order with deadly weapon—jury instructions—violating a protective order

The trial court committed plain error in a violating a domestic violence protective order ("DVPO") case. Because the trial court concluded that the knife used in this case was not a deadly weapon per se, the trial court should have instructed the jury on the lesser-included misdemeanor offense of violating a DVPO. Failing to instruct the jury on the lesser-included misdemeanor offense likely affected the outcome in the case.

Judge DILLON dissenting.

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[234 N.C. App. 412 (2014)]

Appeal by defendant from judgment entered 21 March 2013 by Judge Gary M. Gavenus in Rutherford County Superior Court. Heard in the Court of Appeals on 20 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Michael E. Casterline, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Howard Junior Edgerton (“Defendant”) appeals from a 21 March 2013 judgment sentencing him as a level VI offender for violating a domestic violence protective order (“DVPO”) with a deadly weapon. Defendant argues that the trial court erred by failing to instruct the jury on the lesser-included misdemeanor offense of violation of a DVPO. We agree and order a new trial.

I. Facts & Procedural History

Defendant was indicted on 9 July 2012 for violating a DVPO with a deadly weapon in 11 CRS 052801, and with assault with a deadly weapon with intent to kill (“AWDWIK”), assault by strangulation, and second-degree kidnapping in 11 CRS 052829. Defendant was indicted with AWDWIK and second-degree kidnapping in 11 CRS 052830 and 11 CRS 052831. On 9 July 2012, Defendant was charged with habitual felon status in 12 CRS 1594. Defendant stood trial on 18–21 March 2013 in Rutherford County Superior Court. The record and trial transcript tended to show the following facts.

Brandon Hamilton (“Mr. Hamilton”) testified first for the State. Mr. Hamilton said Jacquie King (“Ms. King”), Amber Harkless (“Ms. Harkless”), and Dianna Moore (“Ms. Moore”) drove to pick up Defendant around 9:30 or 10:00 p.m. on 27 August 2011. The group was traveling to the “Boom Boom Room,” which Mr. Hamilton described as a “bootlegger” in Lake Lure, where the group “had a few drinks.” Mr. Hamilton said he knew that Defendant and Ms. King were previously in a relationship before the evening’s events took place.

Mr. Hamilton described Defendant as “cool” and “laid back” initially, but then said Defendant became angry after Mr. Hamilton “complimented [Ms. King] on her weight loss.” After Mr. Hamilton made these remarks, Mr. Hamilton said the situation escalated and that Defendant threatened him. After Defendant levied these threats, the group got into

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the car to take Defendant home, whereupon Defendant started hitting Ms. King and brandished a pocket knife. After the group stopped the car, Defendant left the vehicle, re-entered, and then began “sawing [Ms. King’s] neck with a dull knife.” Mr. Hamilton said he knew it was a dull knife because “if it was a sharp knife, I am pretty sure – he was sawing at it – she would be dead right now.”

Mr. Hamilton told Ms. Harkless and Ms. King to leave the car, and Defendant continued to threaten them both. Ms. Harkless then drove Defendant to his home and later called police, who met Defendant at his home. Mr. Hamilton spoke with police when they arrived but did not give a statement at that time. Mr. Hamilton said Ms. King had “road rash and scars on her neck. She had a few knots on her.” Mr. Hamilton said that Defendant’s sawing of Ms. King’s neck produced only scratches because the knife was “completely dull.” Mr. Hamilton eventually gave a statement to police.

Ms. King testified at trial, saying she was in an abusive relationship with Defendant. Ms. King said she was afraid of Defendant and that Defendant

beat me, punch[ed] me in my face. One time he kicked me down probably a 20-foot embankment. It was so many things. It was abuse every day. Hit me. He would get drunk and punch me in my face, kick me. He tried to burn my trailer one time. He pulled my mattress into the middle of my trailer. I had people staying with me that had a baby, and he said get your baby out of the house because I am about to burn this down.

Ms. King said she stayed in a relationship with Defendant because she was “scared of him” Ms. King later obtained a one-week temporary restraining order in April 2011 after she said Defendant “pulled a shotgun on” her and her friend. Ms. King later received a year-long DVPO requiring Defendant to avoid all contact with Ms. King.

After the DVPO was granted, Ms. King said Defendant continued to seek contact with her. Eventually Ms. King “went back to him” because she said Defendant “acted like he had changed – like he wasn’t going to be abusive anymore.” Ms. King said Defendant was “[c]alm, respectful, not aggressive at all” when he visited her home the two weeks prior to the evening at issue.

Ms. King said the trip to the Boom Boom Room was the first time that she went out to a club with Defendant since obtaining the DVPO.

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Ms. King also said Defendant was calm at first during the group's time at the Boom Boom Room, but that Defendant became aggressive and began to accuse her of having sexual relations with other members of the group. Ms. King said she began to get nervous and wanted to leave Defendant at the Boom Boom Room, but that Defendant was insistent that he be brought home. After the group allowed him to travel with them, Ms. King said Defendant became "wild" and that he began punching Ms. King in the face.

Ms. Harkless stopped the vehicle when she realized that Defendant was hitting Ms. King. Mr. Hamilton, Ms. Moore, and Defendant exited the vehicle and Mr. Hamilton and Ms. Moore confronted Defendant. Ms. King said that Defendant began to chase Ms. Moore and Mr. Hamilton with a knife and that Defendant was trying to inflict injuries with the knife. Ms. King said Defendant then reentered the vehicle, ordered Ms. Harkless to drive, and began "cutting [Ms. King's] throat." Ms. King said Defendant continued to choke her and told her she would die that evening. Ms. King also said Defendant wasn't "slicing [her] throat" but that Defendant was "digging in with the knife and cutting knicks on my neck, cutting parts of my neck." Ms. King said the cuts on her neck bled, but she did not know the amount of blood produced by the cuts.

Ms. King said she was able to dislodge a car door while the vehicle was still traveling around 40 to 50 miles per hour toward Defendant's father's home, where Defendant lived. As the car approached the home at around 5 to 10 miles per hour, Ms. King said she was pushed by Defendant from the vehicle. Twenty minutes later, Ms. King said a number of police officers returned with Defendant in custody. Ms. King said Defendant was "beating his head against the police window and screaming [her] name" while officers took photos of her injuries.

Ms. King also described her interview with Detective Ricky McKinney ("Detective McKinney") of the Rutherford County Sheriff's Department. Ms. King initially told Detective McKinney that she met Defendant at the Boom Boom Room rather than that the group had picked Defendant up beforehand. Ms. King said her statement was not true and that she told Detective McKinney this because she did not want to disappoint her family. Ms. King also gave a statement to Detective McKinney, which also contained an incorrect statement about the composition of the group who traveled to the Boom Boom Room.

Corporal Stephen Ellis ("Corporal Ellis") testified next at trial. Corporal Ellis responded to a 911 hang-up call and information that Defendant "was assaulting people" in a vehicle. Corporal Ellis traveled

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toward Defendant's residence and located Ms. King laying on the ground alongside Grassy Knob Road. Corporal Ellis spoke with Ms. King about the evening's events and said she was afraid and "visibly upset." Ms. King led Corporal Ellis to Defendant's residence because Corporal Ellis had information that Defendant was possibly holding Ms. Harkless against her will. Corporal Ellis arrested Defendant, whom Corporal Ellis said became belligerent after being arrested.

Corporal Ellis took Defendant back to where he originally found Ms. King and began to complete an incident report, to photograph Ms. King's injuries, and to take statements from Ms. King and Ms. Harkless. Corporal Ellis also said Defendant became irate in the back of his patrol vehicle and hit his head against the car's windows. Corporal Ellis said Ms. King had "lots of red marks on her chest and around her neck area, . . . visible nicks or cuts to the top of her throat" and several bruises. Corporal Ellis also observed blood on Ms. King's shirt.

Officer Tyler Greene ("Officer Greene") was with Corporal Ellis on the evening at issue in this case. Officer Greene recounted similar statements as Corporal Ellis. Officer Greene said he observed cuts on Ms. King's neck and chin, but that they were difficult to see in the photograph presented at trial.

Detective McKinney testified at trial. Detective McKinney interviewed Ms. King, Ms. Harkless, and Ms. Moore two days after the events in question at the sheriff's office on 29 August 2011. Mr. Hamilton did not provide a statement at that time. Forensics Investigator Bruce Green testified that Ms. King brought a shirt to the sheriff's office on 31 August 2011, which Mr. Green identified as a shirt with blood staining.

The State rested its case and Defendant made a motion to dismiss. The trial court granted Defendant's motion with respect to all charges involving Ms. Harkless (11 CRS 52830) and Ms. Moore (11 CRS 52831). The trial court also dismissed the kidnapping charge involving Ms. King in 11 CRS 52829, but denied the motion as relating to the remaining charges. Defendant did not present any evidence. The jury found Defendant guilty of violating the DVPO with a deadly weapon in 11 CRS 52801, but not guilty of the remaining offenses. Defendant then entered a guilty plea to Habitual Felon status and was sentenced in the aggravated range for a Class C felony as a prior record level VI. Defendant was sentenced to an active term of 168 to 211 months. Defendant filed written notice of appeal on 16 April 2013.

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II. Jurisdiction & Standard of Review

Defendant appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2013). However, Defendant did not timely file his notice of appeal in violation of N.C. R. App. P. 4. Failure to comply with Rule 4 constitutes a jurisdictional default, which “precludes the appellate court from acting in any manner other than to dismiss the appeal.” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Accordingly, we dismiss Defendant’s appeal, but, in our discretion, we allow Defendant’s petition for writ of certiorari to review the merits of his arguments pursuant to N.C. R. App. P. 21.

On appeal, Defendant argues that the trial court erred in refusing to instruct the jury on a lesser-included misdemeanor offense of violating a DVPO when it instructed the jury on violating a DVPO with a deadly weapon. Defendant did not object to the jury instruction at issue here, meaning that it was not preserved for appeal. However, “[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007).

“To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

III. Analysis

We hold that because the trial court concluded that the knife used in this case was not a deadly weapon *per se*, the trial court should have instructed the jury on the lesser-included misdemeanor offense of violating a DVPO. We also hold that failing to instruct the jury on the lesser included misdemeanor offense was plain error because it likely affected the outcome in this case.

In *State v. Weaver*, our Supreme Court adopted a definitional test for determining whether one crime is a lesser included offense of another crime. 306 N.C. 629, 635, 295 S.E.2d 375, 378–79 (1982), *disapproved of on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993).

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That test requires that

all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

Id. at 535, 295 S.E.2d at 379.

Under the definitional test, the misdemeanor crime of violating a DVPO¹ is a lesser included offense of the felony crime of violating a DVPO with a deadly weapon.² Both crimes have identical elements of (i) knowingly (ii) violating a (iii) valid DVPO, except that the felony offense includes an additional element that the perpetrator be in “possession of a deadly weapon on or about his or her person or within close proximity to his or her person.” *Compare* N.C. Gen. Stat. § 50B-4.1(a) with N.C. Gen. Stat. § 50B-4.1(g). The felony offense also explicitly references the misdemeanor offense. N.C. Gen. Stat. § 50B-4.1(g) (“Unless covered under some other provision of law providing greater punishment, any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order, shall be guilty of a Class H felony.”).

As the misdemeanor violation of a DVPO is a lesser included offense of the felony violation of a DVPO, Defendant was also entitled to a jury instruction on that charge “if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *State v. Tillery*, 186 N.C. App. 447, 450, 651 S.E.2d 291, 294 (2007) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). The dispositive factor is the presence of evidence to support a conviction of the lesser-included offense. *Id.* As such, we must determine whether the jury could have rationally found that the knife used by the Defendant did not constitute a deadly weapon and also whether there is evidence to support a conviction of misdemeanor violation of a DVPO.

In North Carolina, a “deadly weapon is one which, under the circumstances of its use, is likely to cause death or great bodily harm.” *State v. Walker*, 204 N.C. App. 431, 444, 694 S.E.2d 484, 493 (2010). Generally,

1. N.C. Gen. Stat. § 50B-4.1(a) (2013).

2. N.C. Gen. Stat. § 50B-4.1(g) (2013).

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a weapon is determined to be “deadly” depending on its use and its characteristics. However, North Carolina courts have found some weapons to constitute deadly weapons *per se*. “Some weapons are *per se* deadly, e.g. a rifle or pistol: others, owing to the great and furious violence and manner of use, become deadly.” *State v. Cauley*, 244 N.C. 701, 707, 94 S.E.2d 915, 920 (1956). This Court has found that knives are not always dangerous weapons *per se* and that the circumstances of each case are determinative. *See State v. Smallwood*, 78 N.C. App. 365, 368, 337 S.E.2d 143, 144–45 (1985).

In this case, the trial court concluded that the knife used by the Defendant was not a deadly weapon *per se*, as evidenced by the trial court’s decision not to instruct the jury that the weapon used by the Defendant was deadly as a matter of law. The trial court instructed the jury that in order to find the Defendant guilty of violating a DVPO while in possession of a deadly weapon, the jury must “consider the nature of the knife, the manner in which it was used, and the size and strength of the defendant as compared to the victim.” The record also shows conflicting evidence as to whether or not the knife used by the Defendant on the victim was capable of producing death or great bodily harm. For example, Mr. Hamilton stated that the knife was so dull that even though Defendant was “sawing” Ms. King’s neck with the pocket knife, Ms. King was left with only “knicks” on her neck. However, the jury may also consider the nature of the knife’s use, the size of the knife, and the strength of the party when determining whether the knife is a deadly weapon. *State v. Palmer*, 293 N.C. 633, 643, 239 S.E.2d 406, 413 (1977) (“If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict.”). Therefore, the trial court correctly determined that the knife used by the Defendant in this case was not a deadly weapon *per se*, and properly left this determination to the jury.

Having instructed the jury to determine whether the knife used in this case constituted a deadly weapon, the trial court should have next instructed the jury on the lesser-included misdemeanor offense. This Court was presented with a similar issue in *Tillery*.

In *Tillery*, the Defendant used a 2x4 board in the course of an assault. 186 N.C. App. at 447, 651 S.E.2d at 292. The trial court instructed the jury on the offense of assault with a deadly weapon inflicting serious injury, but refused to instruct on the lesser-included offense of misdemeanor

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assault inflicting serious injury. *Id.* at 448, 651 S.E.2d at 293. On appeal, the Defendant argued that the trial court erred in refusing to instruct on the lesser-included misdemeanor. *Id.* at 449, 651 S.E.2d at 293. This Court agreed, holding that because the trial court did not find the 2x4 board to be a deadly weapon *per se*, the trial judge should have instructed the jury on the lesser-included offense of misdemeanor assault inflicting serious injury. *Id.* at 451, 651 S.E.2d at 294; *see also State v. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002) (finding plain error for the trial court's failure to instruct the jury on the lesser-included misdemeanor assault charge, when "[t]here is sufficient evidence from which the jury could find that the [weapons used] were not used as deadly weapons").

Here, as in *Tillery*, the evidence presented at trial conflicted over whether the weapon used by the Defendant constituted a deadly weapon. In both cases, the only element that distinguished the felony offense from the misdemeanor offense was the Defendant's use of a deadly weapon in the course of the crime. We hold that, in this case, based on conflicting evidence of the knife's deadly qualities, a jury could have rationally found the Defendant guilty of the lesser-included offense of misdemeanor violation of a DVPO.

We must next consider whether the trial court's failure to instruct the jury on the lesser-included misdemeanor offense rose to the level of plain error. "In deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378–79 (1983) (quotation marks and citation omitted).

Here, the State presented a strong case for the lesser-included violation of the DVPO. Defendant signed the DVPO. The timeframe for the DVPO was in effect at the time of the incident. The DVPO was filed on 18 May 2011, was effective until 18 May 2012, and the incidents at issue occurred on 27 August 2011, clearly within the time period of the DVPO. There was also extensive testimony that Defendant contacted and sought contact with Ms. King, which concerns whether he knowingly violated the DVPO.

At trial, Defendant was found guilty of violating the DVPO with a deadly weapon; all other charges were dismissed or Defendant was found not guilty by the jury. The jury returned a not guilty verdict for two charges that included an element of a deadly weapon, including assault with a deadly weapon under N.C. Gen. Stat. § 14-32(b) (2013). It is unclear whether the jury considered the knife a "deadly weapon"

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as to that charge, or whether the jury did not consider the injuries Ms. King sustained to be “serious” under § 14-32. However, the record shows there was extensive testimony about bruising, cuts, and other injuries to Ms. King, as well as testimony that Defendant’s knife was very dull. Whether the jury did or did not believe the knife was a deadly weapon, however, there was not a sentencing option to find Defendant guilty solely of violating the DVPO. With the elements of the misdemeanor DVPO violation likely met, the jury’s only method to sentence Defendant for violating the DVPO was through the felony violation of a DVPO with a deadly weapon. The lack of the misdemeanor sentencing option, in light of the jury’s finding that Defendant was not guilty of assault with a deadly weapon or AWDWIK, likely impacted the jury’s finding of guilt on the felony charge. Accordingly, the trial court’s failure to instruct on the misdemeanor of violating the DVPO rose to the level of plain error. As such, we remand this matter for a new trial. In light of our decision, we decline to address Defendant’s remaining assignments of error.

IV. Conclusion

For the reasons stated above, we order a

NEW TRIAL.

Judge STROUD concurs.

Judge DILLON dissenting.

I do not agree with the majority that any error by the trial court in failing to instruct the jury on the lesser-included misdemeanor domestic violence protective order (“DVPO”) violation rose to the level of plain error; and, therefore, I respectfully dissent.

A person who knowingly violates a DVPO commits a misdemeanor, *see* N.C. Gen. Stat. § 50B-4.1(a) (2013); unless the person who violates the DVPO does so “while in the possession of a deadly weapon on or about his or her person or within close proximity to his or her person[,]” in which case that person is guilty of a felony. N.C. Gen. Stat. § 50B-4.1(g). As the majority correctly points out, the question is whether any error by the trial court in failing to instruct the jury on the lesser misdemeanor DVPO in the present case rose to the level of plain error; that is, whether the jury **probably** would have convicted Defendant of misdemeanor DVPO, thereby concluding that the State had failed to prove that the knife was a “deadly weapon.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

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The pocketknife, which Defendant brandished in the victim's face and about her neck while choking her and threatening to kill her, had a blade which was described at trial as a "little duller than average." I certainly believe it is *possible* that the jury could have determined that the knife was not a deadly weapon, and would have, therefore, convicted Defendant of only a misdemeanor DVPO violation had it been instructed on this lesser-included offense. However, I also believe that the evidence was sufficient to sustain the finding that the knife was, indeed, a deadly weapon. Accordingly, I cannot say that the jury "probably" would have convicted Defendant of a misdemeanor DVPO if given that option.

The majority argues that the failure to instruct on a misdemeanor DVPO violation had a "probable impact" because the jury's verdict to convict on the felony DVPO violation was inconsistent with their decision to acquit Defendant of assault with a deadly weapon and AWDWIK, crimes which require a finding that Defendant possessed a deadly weapon. In explaining inconsistent verdicts, our Supreme Court has stated as follows:

[Inconsistent verdicts] should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, probably reached its conclusion on [one offense], and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [other offense].

....

Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given the uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.

State v. Mumford, 364 N.C. 394, 399-400, 699 S.E.2d 911, 915 (2010) (quoting *United States v. Powell*, 469 U.S. 57, 83 L. Ed. 2d 461 (1984)). Therefore, following our Supreme Court's rationale in *Mumford*, I cannot say that, in the present case, it is **probable** the jury would have acquitted Defendant of a felony DVPO violation based on its acquittal of the assault charges. It is "equally possible" that the jury was convinced of Defendant's guilt of the Chapter 50B charge, but that it reached an

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inconsistent verdict on the Chapter 14 assault charges – assuming that the verdicts were, indeed, inconsistent¹– through “mistake, compromise or lenity[.]” *Id.*

STATE OF NORTH CAROLINA

v.

MARKEITH RAYSHOUN MITCHELL, DEFENDANT

No. COA13-1080

Filed 17 June 2014

1. Burglary and Unlawful Breaking or Entering—State’s burden of proof—either breaking or entering—acting in concert

The State’s burden of proof in a prosecution for breaking or entering a motor vehicle is satisfied by evidence of *either* a breaking *or* an entering. Where the trial court instructs the jury on the acting in concert doctrine, the State’s burden as to the element of breaking can be satisfied by showing either that defendant personally committed the breaking or that he acted in concert with someone to commit the breaking.

2. Burglary and Unlawful Breaking or Entering—motor vehicle—intent to steal vehicle—no intent to steal contents

The trial court did not err by denying defendant’s motion to dismiss a charge of breaking or entering a motor vehicle where defendant argued that there was intent to steal the vehicle, but no intent to steal anything inside the vehicle. Defendant’s argument, however, was rejected in *State v. Clark*, 208 N.C. App. 388.

3. Burglary and Unlawful Breaking or Entering—motor vehicle—jury instructions—disjunctive

The trial court did not commit reversible error by instructing the jury on a theory of breaking *or* entering a motor vehicle when the indictment alleged that defendant broke *and* entered the vehicle.

1. It is possible that the jury’s verdicts were not inconsistent. Specifically, whether a weapon is deadly in the context of the Chapter 14 assault crimes for which Defendant was acquitted might depend on the “circumstances of [the weapon’s] use,” *State v. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002), whereas the Chapter 50B felony for which Defendant was convicted does not require that the defendant “use” the weapon at all, but only that he *possessed* it when he violated the DVPO. Accordingly, the jury may have determined that the knife was a deadly weapon, but that he did not use it in a manner which was likely to cause death.

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4. Trespass—first degree—belief of right to enter property—instruction denied

There was no plain error in a prosecution for first-degree trespass where the trial court refused to instruct the jury on defendant's affirmative defense of a reasonable belief that he was entitled to enter the property. The jury's verdict as to larceny charges precluded a finding that defendant believed he had a legal right to enter the property.

Appeal by defendant from judgments entered 16 May 2013 by Judge Marvin K. Blount, III in Nash County Superior Court. Heard in the Court of Appeals 22 January 2014.

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

William B. Gibson for defendant-appellant.

GEER, Judge.

Defendant Markeith Rayshoun Mitchell appeals from his convictions of felonious breaking or entering a motor vehicle, first degree trespass, injury to real property, and attempted larceny. On appeal, defendant primarily contends that the trial court erred in denying his motion to dismiss the charge of breaking or entering and in instructing the jury on a charge of "breaking or entering" when the indictment charged "breaking *and* entering." We hold that because of the disjunctive language of N.C. Gen. Stat. § 14-56 (2013), the State need not prove both a breaking and an entering and the instruction was not erroneous. The State's evidence that defendant opened the car door with intent to steal the car itself was substantial evidence that defendant committed a breaking with intent to commit a felony therein. Because defendant does not challenge the sufficiency of the State's evidence as to the remaining elements of the charge, we hold that the trial court did not err in denying the motion to dismiss.

Facts

The State's evidence tended to show the following facts. On 26 March 2012, defendant offered Marcus Lucas \$50.00 to "help him get a car." The two men drove in defendant's Jeep Cherokee to 1021 Russell Street, the property where the vehicle was located. When they arrived, the fence around the property was locked. Defendant and Lucas tore the fence down and entered the property.

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Once inside, defendant backed his Jeep up to a shelter in the backyard where a 1979 Dodge Aspen was parked. Defendant and Lucas exited the Jeep, and defendant opened the door of the Dodge. Lucas stood back as defendant retrieved the tire pump from his Jeep and began pumping up the flat tire on the Dodge.

Meanwhile, Officer J.K. Richardson of the Rocky Mount Police Department received a call that a breaking and entering was in progress on 1021 Russell Street. Officer Richardson arrived at the scene a short time later and announced his presence as he approached the garage. Although Lucas immediately fled, defendant, who was at the rear of the Dodge pumping the tire, did not see the police arrive. Defendant was arrested at the scene, while Lucas was arrested later.

After taking defendant into custody, Officer Richardson returned to the garage. The Jeep was backed up to the garage approximately five feet from the Dodge, and the trunk and driver's door of the Jeep were open. Inside the Jeep, Officer Richardson saw an air compressor and a metal pipe with pieces of rope on each end, an apparatus that is normally used for towing vehicles. There was a rope attached to the back of the Jeep that went toward the Dodge, but was not yet hooked up to the Dodge.

The driver's side door of the Dodge had been left open. Officer Richardson concluded that the door had recently been opened because it was pollen season and the outside of the Dodge and the garage were both very dusty, but there was no pollen on the interior of the Dodge or on the tool kits and tarps stored inside the Dodge.

The Dodge and the property where it was parked belonged to Brenda Simmons, who had inherited it from her deceased parents. Ms. Simmons had never opened the driver's door of the Dodge after her father passed away. She had visited her property the evening prior to defendant's arrest while it was still daylight out and, from her vantage point in the backyard, she had not noticed the car door of the Dodge being open. Ms. Simmons did not know defendant or Lucas and did not consent to either of them coming on her property or taking the Dodge.

On 4 June 2012, defendant was indicted for attempted larceny, first degree trespass, injury to real property, and breaking and entering a motor vehicle. At trial, defendant testified on his own behalf. He claimed that, on the morning of 26 March 2012, he was out driving when he saw Lucas motion for him to stop. Lucas told defendant that a friend had given him a car and that he needed someone to help him get the car home. He offered defendant \$50.00 to help, and defendant agreed. Lucas

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already had a chain for towing, but they went to defendant's uncle's house to get a towing bar and an air compressor. When they arrived at the property where the car was located, defendant saw that there was a locked fence, but Lucas pulled the fence over to one side with his hands.

Once they gained entry onto the property, defendant backed the Jeep up to the Dodge while Lucas retrieved a chain off the dog house in the backyard. At that point, the police arrived and Lucas fled. Defendant did not flee because he did not know that they were stealing a car. Defendant denied having ever touched the Dodge, having opened the car door, or having noticed that the door was ajar.

The jury found defendant guilty of attempted larceny, first degree trespass, injury to real property, and breaking or entering a motor vehicle. The trial court sentenced defendant to 60 days imprisonment on the consolidated charges of attempted larceny, first degree trespass, and injury to real property. The trial court also sentenced defendant to six to 17 months imprisonment for breaking or entering a motor vehicle, but suspended the sentence and imposed 24 months of supervised probation. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of felonious breaking or entering a motor vehicle. “‘Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). “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).

“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). We 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).

Defendant was charged with breaking and entering a motor vehicle in violation of N.C. Gen. Stat. § 14-56. In order to obtain a conviction for breaking and entering a motor vehicle,

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“the State must prove the following five elements beyond a reasonable doubt: (1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein.”

State v. Clark, 208 N.C. App. 388, 390-91, 702 S.E.2d 324, 326 (2010) (quoting *State v. Jackson*, 162 N.C. App. 695, 698, 592 S.E.2d 575, 577 (2004)). Defendant contends that the State presented insufficient evidence of the first and fifth elements.

As to the first element, evidence of *either* a breaking or an entering satisfies the State’s burden of proof. See *State v. Myrick*, 306 N.C. 110, 114, 291 S.E.2d 577, 579 (1982) (holding, under identical language in N.C. Gen. Stat. § 14-54(a) (1979), State “need not show both a breaking and an entering”).

This Court has held that

“[b]reaking is defined as any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. A breaking may be actual or constructive. A defendant has made a constructive breaking when another person who is acting in concert with the defendant actually makes the opening. Acting in concert means that the defendant is present at the scene of the crime and acts 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. Baskin, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (2008) (quoting *State v. Graham*, 186 N.C. App. 182, 196-97, 650 S.E.2d 639, 649 (2007)). A breaking may be established by a “‘mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, or the opening of a locked door with a key.’” *State v. Garcia*, 174 N.C. App. 498, 502, 621 S.E.2d 292, 296 (2005) (quoting *State v. Bronson*, 10 N.C. App. 638, 640, 179 S.E.2d 823, 825 (1971)).

Where, as here, the trial court instructs the jury on the acting in concert doctrine, the State’s burden as to the element of breaking can be satisfied by showing either the defendant personally committed the breaking or that he acted in concert with someone to commit the breaking. See *Baskin*, 190 N.C. App. at 109-10, 660 S.E.2d at 572 (holding that

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sufficient evidence of breaking and entering by defendant existed when passenger in car driven by defendant reached inside victim's car and stole victim's satchel).

In this case, the evidence viewed in the light most favorable to the State is sufficient to show that defendant, or, alternatively, Lucas acting in concert with defendant committed a breaking by opening the door of the Dodge. Officer Richardson testified that when he arrived on the scene, defendant was standing near the Dodge and the Dodge's driver-side door was open. The State also presented evidence that the door must have been recently opened because there was no pollen inside although the outside of the car was covered in pollen and the owner of the Dodge never opened the doors of the Dodge and its door was not open the previous afternoon. Moreover, defendant testified that Lucas opened the car door, while Lucas testified that defendant opened the door. From this evidence, a reasonable juror could infer that defendant opened the car door, or, alternatively, that Lucas opened the door and was acting in concert with defendant.

[2] Defendant also argues that there was insufficient evidence of the fifth element -- that the act was committed "with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-56. Defendant argues that while the evidence presented by the State may be sufficient to show that defendant intended to steal the car itself, it was not sufficient to show intent to steal the "thing[s] of value" found therein. *Id.*

Defendant's argument, however, was rejected by this Court in *Clark*, 208 N.C. App. at 393, 702 S.E.2d at 327-28. In *Clark*, this court held that the intent to steal the motor vehicle itself may satisfy the intent element under N.C. Gen. Stat. § 14-56. 208 N.C. App. at 393, 702 S.E.2d at 327-28. Defendant concedes that the State presented sufficient evidence that defendant, or Lucas acting in concert with defendant, intended to steal the vehicle itself. Under *Clark*, such evidence is sufficient. We, therefore, conclude that the State presented substantial evidence of each of the elements of the charge of breaking or entering a motor vehicle. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss.

II

[3] Defendant next argues that the trial court committed reversible error by instructing the jury on a theory of breaking or entering a motor vehicle when the indictment alleged that defendant broke and entered the vehicle. "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*,

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202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). “However, an error in jury instructions is prejudicial and requires a new trial only if ‘there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.’ ” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

Defendant’s argument has previously been rejected regarding the offense of breaking or entering a building under N.C. Gen. Stat. § 14-54 (2013). Under this statute, where an indictment alleging a violation of N.C. Gen. Stat. § 14-54 charges the defendant with “breaking *and* entering,” it is not error for the trial court to instruct on breaking *or* entering. *State v. Boyd*, 287 N.C. 131, 145, 214 S.E.2d 14, 22 (1975), *superseded by statute on other grounds as stated in State v. Silhan*, 302 N.C. 223, 239, 275 S.E.2d 450, 464 (1981). As explained in *Boyd*:

It has long been the law in this State in prosecutions under [N.C. Gen. Stat. § 14-54] and its similar predecessors that where the indictment charges the defendant with breaking *and* entering, proof by the State of either a breaking or an entering is sufficient; and instructions allowing juries to convict on the alternative propositions are proper.

Id. See also *State v. Reagan*, 35 N.C. App. 140, 143, 240 S.E.2d 805, 808 (1978) (holding no error when the defendant was indicted for breaking and entering and the trial court’s charge to the jury referenced breaking or entering). The act of “breaking or entering” is an element of a charge pursuant to both N.C. Gen. Stat. § 14-54 and N.C. Gen. Stat. § 14-56. We therefore find that the rule under *Boyd* is applicable to the element of “breaking or entering” regardless whether the defendant “breaks or enters” a motor vehicle under N.C. Gen. Stat. § 14-56 or a dwelling house under N.C. Gen. Stat. § 14-54. Accordingly, we hold that the trial court did not err in instructing the jury on “breaking or entering.”

III

[4] Defendant’s final argument on appeal pertains to the charge of first degree trespassing. Defendant argues that the trial court erred by failing to instruct the jury on defendant’s affirmative defense that he reasonably believed he had a right to enter the property. Because defendant did not request the instruction at trial, we review for plain error.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must

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establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

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

For a trial court to be required to instruct the jury on an affirmative defense, the defendant must present substantial evidence, when viewed in the light most favorable to the defendant, of each element of the defense. *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000). Here, defendant needed to present substantial evidence that (1) defendant believed he had a right to enter the property and (2) defendant had reasonable grounds to support this belief. *State v. Baker*, 231 N.C. 136, 140, 56 S.E.2d 424, 427 (1949).

Defendant argues that his testimony constitutes substantial evidence of this affirmative defense. Defendant testified that when he met up with Lucas on the morning of 26 March 2012, Lucas told him that a friend had given him a car, that he needed someone to help him get the car home, and that he would pay defendant \$50.00 for his assistance in retrieving the car. Although the property where the car was located was enclosed by a locked fence, defendant testified that Lucas was easily able to pull the fence to one side. Under these circumstances, defendant contends, his belief that they had permission to be on the property remained reasonable.

However, even assuming, without deciding, that defendant presented substantial evidence of each element of this defense, he cannot show that the failure of the trial court to instruct the jury on this defense had a probable impact on its finding of guilt. The jury's verdict as to the larceny charges required a finding that defendant intended to steal the vehicle, or that Lucas intended to steal the vehicle and defendant acted in concert with him. In either scenario, such a finding precludes a finding by the jury that the defendant believed that he had a legal right to enter the property. Defendant has therefore failed to show that he was prejudiced by the alleged error.

No Error.

Judges BRYANT and CALABRIA concur.

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[234 N.C. App. 431 (2014)]

STATE OF NORTH CAROLINA

v.

GREGORY PARKS

No. COA13-1283

Filed 17 June 2014

1. Appeal and Error—preservation of issues—failure to raise at trial—substance of article sufficiently presented

Defendant's contention regarding the corpus delicti rule was heard on appeal where the exact words were not used at trial, but the substance of the argument was sufficiently presented.

2. Criminal Law—prostitution of minor—evidence not sufficient—corpus delicti rule

The record in a prosecution for participating in the prostitution of a minor was insufficient where the State erroneously relied solely on defendant's extrajudicial statement to prove his guilt, without providing other corroborating evidence. Although the two victims gave several differing accounts of events, both testified at trial that defendant did not solicit sex from them in exchange for money or marijuana. Furthermore, defendant's extrajudicial statement regarding an alleged exchange of sex for money or marijuana was vague.

Appeal by defendant from judgments entered 11 February 2013 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 5 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

M. Alexander Charms for defendant-appellant.

McCULLOUGH, Judge.

Defendant Gregory Kent Parks appeals the denial of his motion to dismiss two counts of participating in the prostitution of a minor. Where the State failed to produce substantial, independent corroborative evidence to support the facts underlying defendant's extrajudicial statement, in violation of the *corpus delicti* rule, we reverse defendant's challenged convictions.

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I. Background

On 10 September 2012, defendant was indicted on two counts of first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4 and attaining habitual felon status. On 14 January 2013, defendant was charged by superseding indictment with two counts of participating in the prostitution of a minor in violation of N.C. Gen. Stat. § 14-190.19(a).

On 16 November 2013, Wilson County Superior Court Judge Milton F. Fitch entered an order, *sua sponte*, which provided the following:

Upon review, the Court determined that in order to prevent any further delay of the Defendant's cases and guarantee Defendant's right to a speedy trial that the SBI laboratory expedite and conduct any and all testing of any materials submitted and held relating to these cases.

This Court hereby orders that the N.C. SBI laboratory expedite and perform DNA analysis and any other requested testing on any and all materials submitted to and held by the N.C. SBI Laboratory in these cases; and a laboratory report of the results to these ordered analysis be returned to the submitting parties and to District Attorney's Office of the Seventh Prosecutorial District no later than December 21, 2012.

Prior to trial, on 1 February 2013, defendant filed a motion to dismiss the charges against him for failure by the State to test or properly preserve DNA specimens in his case and for failure to follow a 16 November 2012 order requiring the SBI laboratory to conduct any and all testing of any materials submitted and held relating to defendant's case. The trial court denied this motion.

Defendant's trial commenced at the 4 February 2013 criminal session of Wilson County Superior Court. A.J. testified that on the evening of 15 June 2012, she was at home with her friend, D.T.¹ D.T. was on the phone with defendant. D.T. told A.J. that defendant "was going to give her some marijuana for free if I walked down there with her, so I walked with her down the street." Defendant lived "three houses down, right up the street." When A.J. and D.T. arrived at defendant's house, defendant answered the door and said, "[w]ill you come in?" After they

1. Because A.J. and D.T. were minors during the commission of the alleged crimes, both seventeen years old in 15 June 2012, initials are used to protect their identities.

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walked inside, defendant closed the door behind them. A.J. testified to the following:

Well, we got in the home, there was an older man [(defendant's father)] in a wheelchair in there, and he said, "Well, y'all can walk on back here, follow me to my room." He said, "I'm not going to give you the marijuana out here." [So] I followed [D.T.] and [defendant] back to his room. And when we got in the bedroom, he pulled out a knife.

Defendant had closed his bedroom door. Defendant put the knife to A.J.'s neck and said "he was going to kill me if I didn't take my clothes off. . . . He told both of us to take our clothes off before he killed us."

A.J. testified that defendant went into an adjoining bathroom, returned with pills, and told the girls "to take the pills or he was going to kill us." A.J. took one pill.

After [defendant] got the pills and made us take them, he told us — well, we were lying on the bed, and he just got on top of us — on me first, and he started licking me on my vagina, and then he went over to [D.T.], and he started licking on her vagina, and then he told me to just wait until he finished her.

Defendant went back and forth between A.J. and D.T. until A.J. stabbed him with a scalpel in the head. A.J. testified that she had brought a scalpel from her house and kept it in her coat pocket. After stabbing defendant, A.J. and D.T. ran out of the bedroom and unsuccessfully attempted to exit the house through a locked side door. Defendant's father was telling defendant "to stop and to let us go and that he was tired of him doing it." While A.J. and D.T. were standing by the back door, defendant stated, "[w]ell, you made my dad mad, I'm going to kill you[.]" Defendant's father followed A.J. and D.T. back to the bedroom "to get [our] clothes." After they put their clothes back on, defendant opened the door and A.J. and D.T. went home.

A.J. called the police. A.J. initially reported to police that she and D.T. were on their way to McDonald's when defendant "grabbed" them, pulled out a knife, forced them to take drugs and pills, and sexually assaulted them. She admitted at trial that when she first spoke with police, she did not "tell the truth at first, because I was afraid that I might get in trouble because I'm going to get some marijuana with a friend." In addition, A.J. testified that defendant did not solicit sex in exchange for money or marijuana.

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D.T. testified that on the evening of 15 June 2012, she was at A.J.'s house when defendant called her. Defendant said "he was going to give [A.J.] a bag of some weed[.]" D.T. testified that there was no agreement between defendant and herself for sex, an exchange of marijuana for sex, or an exchange of money for sex. A.J. and D.T. walked to defendant's house. Defendant took them into his bedroom. The three sat on his bed and defendant took out pills from his pocket. Defendant then proceeded to pull out a pocketknife and stated, "I'm crazy, I've been doing this for years, and y'all — y'all take off y'all's clothes now. I ain't playing with y'all." D.T. used the bathroom that was adjoined to the bedroom and called the police.

Defendant forced D.T. and A.J. to take their clothes off and lay on the bed. Defendant put his "tongue in [their] vagina[s]." D.T. grabbed a scalpel from a pocketbook, passed it to A.J., and A.J. stabbed defendant in the back of his head. A.J. and D.T. ran out of the bedroom, but encountered a locked door. Defendant's father told defendant, "Gregory, just let them go, just let them go." Defendant began shouting, "[d]addy, shut up. Y'all going to make my daddy have a heart attack. You shut up." Defendant's father then followed A.J. and D.T. back to defendant's bedroom and they put on their clothes. Afterward, A.J. and D.T. left defendant's home, returned to A.J.'s house, and called the police.

D.T. admitted that she lied in her first statement to the police when she reported the following:

Well, the first time I told — I told that we had went — we was on the way to McDonald's and he had snatched us up; which, it was a lie. I knew it was a lie when we told y'all that we was going to McDonald's and stuff and he snatched us up. That ain't it. It really was that we had went to go do some weed, like, he had called the phone and said he was gonna give us [weed.]

Detective Michael Thomas Harrell of the Wilson Police Department testified that on the morning of 16 June 2012, defendant gave the following statement to police:

On Wednesday, I called [A.J.] for the first time. I see her around the neighborhood and say, 'Hey,' when I see her. She had some drama on Wednesday, so I called her to see what happened. We talked for about an hour before she asked me if I could get any weed. I told her I might could get some weed. She said she would get back up with me on Friday. I tried to call her . . . She called me back, and I told

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her I had something for her. She asked if I had any money. I said, 'Yeah, I got some money.' She said she was waiting on her friend. She called me back about three times and asked which house to come to. . . . [A.J.] asked, and said, "You are supposed to have something waiting on me." I said, "Why, did you bring something?" We went back to my room and I asked what they were working with. They both took their clothes off. [A.J.] asked about the money, again, and I played it off, because I didn't have much money for them. They told me to get them going, so I was touching on them and eating them out, switching back and forth. When I went back down on [D.T.], [A.J.] hit me in the back of the head, and I said, 'What the f***?' She went for the door. I think she went in the drawer where I had pointed to earlier when I said I got some money. I don't know if they set me up or not.

On 11 February 2012, a jury found defendant guilty of both counts of participating in the prostitution of a minor and not guilty of both charges of first-degree sexual offense. Defendant pled guilty to having attained habitual felon status. Defendant was sentenced to two consecutive terms of 127 to 165 months. Defendant appeals.

II. Discussion

On appeal, defendant argues that the trial court erred by (A) denying his motion to dismiss two counts of participating in the prostitution of a minor based on insufficiency of the evidence and based on a fatal variance between the indictments, jury charge, and proof at trial; (B) admitting evidence in violation of Rule 404(b) of the North Carolina Rules of Evidence; (C) violating his constitutional rights under the Sixth Amendment of the United States Constitution; (D) denying his motion to dismiss based on a failure to obey a court order to test evidence; and (E) allowing amendment of the superseding indictments.

A. Motion to Dismiss the Charges of Participating in the Prostitution of a Minor

Defendant argues that the trial court erred by denying his motion to dismiss the charges of participating in the prostitution of a minor charges for insufficiency of the evidence. Specifically, defendant contends that the State failed to present sufficient evidence that defendant "patronized a minor prostitute." Defendant argues that the State erroneously relied solely on defendant's extrajudicial statement to prove his

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guilt, without providing other corroborating evidence in violation of the *corpus delicti* rule. We agree.

[1] Before reaching the merits of defendant's arguments, we address the State's contention that defendant failed to raise the issue of a violation of the *corpus delicti* rule at trial and that, as a result, he has failed to preserve this issue for appellate review. Pursuant to Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure, we note 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. Rule 10(a)(1) (2013). However, after thoroughly reviewing the transcript of defendant's trial, we hold that although defense counsel did not use the exact words "*corpus delicti*" in arguing that the trial court grant defendant's motion to dismiss the charges of promoting the prostitution of a minor based on the insufficiency of the evidence, the substance of the argument was sufficiently presented to the trial court. Accordingly, we proceed to the merits of defendant's arguments. See *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003) (holding that "[a]lthough defendant did not raise his double jeopardy argument using those exact words, the substance of the argument was sufficiently presented, and more importantly, addressed by the trial court in finalizing its instructions to the jury").

When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (citation omitted). "This Court reviews the trial court's denial of a motion to dismiss *de novo* and views the evidence in the light most favorable to the State, giving the State every reasonable inference therefrom, and resolving any contradictions or discrepancies in the State's favor." *State v. Miles*, __ N.C. App. __, __, 730 S.E.2d 816, 822 (2012) (citation omitted).

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[2] In light of these principles, we consider the elements of the offense of participating in the prostitution of a minor. Pursuant to N.C. Gen. Stat. § 14-190.19²,

[a] person commits the offense of participating in the prostitution of a minor if he is not a minor and he patronizes a minor prostitute. As used in this section, “patronizing a minor prostitute” means:

- (1) Soliciting or requesting a minor to participate in prostitution;
- (2) Paying or agreeing to pay a minor, either directly or through the minor’s agent, to participate in prostitution; or
- (3) Paying a minor, or the minor’s agent, for having participated in prostitution, pursuant to a prior agreement.

N.C. Gen. Stat. § 14-190.19 (2011).

Defendant relies on the North Carolina Supreme Court’s holding in *State v. Smith*, 362 N.C. 583, 669 S.E.2d 299 (2008). In *Smith*, the issue before the Court was whether there was substantial corroborating evidence independent of the defendant’s extrajudicial confession sufficient to sustain a conviction for first-degree sexual offense. *Id.* at 585, 669 S.E.2d at 301. The Court noted that in order to find a defendant guilty of first-degree sexual offense, the State must prove, beyond a reasonable doubt, that

(1) the defendant engaged in a sexual act with a victim who is under the age of thirteen, and (2) the defendant is at least twelve years old and at least four years older than the victim. A sexual act, as defined by statute, means “cunnilingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body[.]” Fellatio is defined as “any touching of the male sexual organ by the lips, tongue, or mouth of another person.”

2. We note that, effective 1 October 2013, N.C. Gen. Stat. § 14-190.19 was repealed by Session Laws 2013-368, s. 4. The current statute is applicable to offenses committed on or after 1 October 2013. However, because the events of this case took place on 15 June 2012, the former statute applies.

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Id. at 592-93, 669 S.E.2d at 306 (citations omitted). The *Smith* Court stated that “[u]nder the *corpus delicti*³ rule, the State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that supports the facts underlying the confession.” *Id.* at 588, 669 S.E.2d at 303 (citing *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985)).

The *Smith* victim “twice denied that a first-degree sexual offense ever occurred.” *Id.* at 593, 669 S.E.2d at 306. In reviewing the defendant’s extrajudicial confession, the defendant provided that the victim “unzipped his pants, removed his penis, and attempted fellatio, but that he could not achieve an erection because of his alcohol consumption.” *Id.* (emphasis in original). The *Smith* Court stated that taking into consideration the defendant’s extrajudicial confession alone, “a jury could not determine beyond a reasonable doubt that [the victim’s] mouth ever made contact with [the] defendant’s penis, which is a required element in a sexual offense prosecution.” *Id.* at 593-94, 669 S.E.2d at 306.

The State argued that several pieces of corroborative evidence, along with the defendant’s extrajudicial confession, were sufficient under the *corpus delicti* rule to sustain a conviction for first-degree sexual offense, but the *Smith* Court disagreed. The State first argued that the defendant’s trial testimony that he felt “something” touch his penis was strongly corroborative, but the Court held that, “[l]ike the extrajudicial confession, this statement is also vague; it is not clear from the record what this ‘something’ was.” *Id.* at 594, 669 S.E.2d at 307. Next, the State argued that defendant’s statement to the victim’s brother that “he had let [the victim] give him oral sex” was strongly corroborative. The *Smith* Court held that the corroborating evidence supporting the defendant’s extrajudicial confession must be substantial and *independent*, and that this statement was not independent because it was derived immediately following defendant’s extrajudicial confession elicited by a detective. *Id.* Lastly, the State argued that several pieces of “opportunity evidence” – testimony from both the defendant and the victim that they were alone together in a bedroom as well as testimony from the victim’s brother that he left the victim with the defendant – were sufficient to sustain the defendant’s conviction. The *Smith* Court held that because “no independent proof, such as physical evidence or witness testimony, of any crime [could] be shown[,]” the opportunity evidence was not strong enough to establish the *corpus delicti* of first-degree sexual offense. *Id.*

3. “The term *corpus delicti* literally means ‘body of the crime.’” *State v. Smith*, 362 N.C. 583, 589, 669 S.E.2d 299, 304 (2008) (citations omitted).

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at 595-96, 669 S.E.2d at 307-308. Based on the foregoing, the *Smith* Court held that the State “ha[d] not met its burden [of providing] strong corroboration evidence relevant to the essential facts and circumstances of [the] defendant’s extrajudicial confession” and reversed the defendant’s conviction. *Id.* at 596, 669 S.E.2d at 308.

Similar to the facts found in *Smith*, in the case *sub judice*, although A.J. and D.T. gave several differing accounts of the events that took place on the evening of 15 June 2012, both A.J. and D.T. testified at trial that defendant did not solicit sex from them in exchange for money or marijuana. Furthermore, we find defendant’s extrajudicial statement regarding an alleged exchange of sex for money or marijuana with A.J. and D.T. to be vague. Defendant’s extrajudicial statement provided the following, in pertinent part:

[A.J.] asked if I had any money. I said, ‘Yeah, I got some money.’ She said she was waiting on her friend. She called me back about three times and asked which house to come to. . . . [A.J.] asked, and said, “You are supposed to have something waiting on me.” I said, “Why, did you bring something?” We went back to my room and I asked what they were working with. They both took their clothes off. [A.J.] asked about the money, again, and I played it off, because I didn’t have much money for them.

The State argues that “an agreement to exchange sex for marijuana might be inferred even without Defendant’s statements” and that other independent evidence corroborated defendant’s extrajudicial confession. However, after careful review, we are not persuaded. The record is insufficient to strongly corroborate the essential element that defendant patronized a minor prostitute in order to convict defendant of participating in the prostitution of a minor. Because the State did not meet its burden in violation of the *corpus delicti* rule, we hold that the trial court erred by failing to grant defendant’s motion to dismiss. Accordingly, we reverse defendant’s conviction of two counts of participating in the prostitution of a minor.

Based on the disposition of defendant’s first argument, it is unnecessary for us to address his remaining arguments on appeal.

Reversed.

Judges HUNTER, Robert C., and GEER concur.

STATE v. SATTERTHWAITE

[234 N.C. App. 440 (2014)]

STATE OF NORTH CAROLINA

v.

GREGVON SATTERTHWAITE

No. COA13-1323

Filed 17 June 2014

1. Drugs—possession of drug paraphernalia—motion to dismiss—sufficiency of evidence—plastic baggies

The trial court erred by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. The indictment alleged possession of plastic baggies as drug paraphernalia, and the State did not present evidence of plastic baggies.

2. Constitutional Law—effective assistance of counsel—claim dismissed without prejudice

Defendant's contentions in a drugs case concerning ineffective assistance of counsel were dismissed without prejudice since the record did not conclusively demonstrate whether defendant received ineffective assistance of counsel.

Appeal by defendant from judgment entered 25 June 2013 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 22 April 2014.

Roy Cooper, Attorney General, by E. Burke Haywood, Special Deputy Attorney General, for the State.

Leslie C. Rawls for defendant-appellant.

STEELMAN, Judge.

Where the indictment alleged possession of plastic baggies as drug paraphernalia, and the State did not present evidence of plastic baggies, the trial court erred in denying defendant's motion to dismiss the charge of possession of drug paraphernalia. Where the cold record does not demonstrate whether defendant received ineffective assistance of counsel, this argument is dismissed without prejudice.

I. Factual and Procedural Background

In 2011, Brandi Lynn Cooke (Cooke) was charged with trafficking in controlled substances. In order to seek more favorable treatment

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for her charges, Cooke began working with Beaufort County Sheriff's Lieutenant Josh Shiflett (Shiflett) to investigate local drug dealers. Cooke informed Shiflett that one of her suppliers was Gregvon Satterthwaite (defendant), also known as "Popcorn."

On 25 May 2011, Cooke called defendant to set up a drug buy. Afterwards, Cooke contacted Shiflett and set up the deal as an undercover hydrocodone purchase. In advance of the deal, police searched Cooke and her car, and provided her with audio and video recording equipment, as well as \$220 from the department's special funds for controlled substance purchases.

While Cooke was under police surveillance, defendant approached Cooke's vehicle and got into the front seat. Cooke gave defendant \$200, and defendant gave Cooke a bottle of pills. Defendant then left. Cooke gave the pills to police. There were sixty pills of one variety, and ten of another; Shiflett tentatively identified the pills as hydrocodone. The pills were then sent to the SBI for testing to confirm their chemical composition.

Lauren Wiley (Wiley), a forensic chemist for the SBI, testified as to the analyses performed on the pills. The sixty white pills weighed 38.2 grams, and each contained 500 milligrams of acetaminophen and 5 milligrams of hydrocodone. The ten yellow pills weighed 4.2 grams, and each contained 325 milligrams of acetaminophen and 10 milligrams of hydrocodone.

Defendant was indicted for trafficking in opium by possession, trafficking in opium by transportation, trafficking in opium by sale, trafficking in opium by delivery, and possession of drug paraphernalia. On 25 June 2013, the jury found defendant guilty of all charges. The trial court arrested judgment on the conviction for trafficking in opium by delivery. The remaining charges were consolidated, and defendant was sentenced to an active term of imprisonment of 225-279 months. The trial court also imposed a \$500,000.00 fine.

Defendant appeals.

II. Denial of Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of possession of drug paraphernalia. We agree.

STATE v. SATTERTHWAITE

[234 N.C. App. 440 (2014)]

A. Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Analysis

The indictment that charged defendant with possession of drug paraphernalia stated that he possessed plastic baggies used to package and repackage pills. At trial, however, the State did not present any evidence of baggies. Instead, the evidence showed that defendant delivered the pills to Cooke in a bottle. Defendant contends that the absence of evidence of plastic baggies required the trial court to dismiss the charge of possession of drug paraphernalia, and that it was error to fail to do so.

N.C. Gen. Stat. § 90-113.22 makes it “unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . package, repackage, store, contain, or conceal a controlled substance . . .” N.C. Gen. Stat. § 90-113.22(a) (2013). “Drug paraphernalia” is defined as “all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act[.]” N.C. Gen. Stat. § 90-113.21(a) (2013). According to this definition:

“Drug paraphernalia” includes, but is not limited to, the following:

. . .

(9) Capsules, balloons, envelopes and other containers for packaging small quantities of controlled substances;

(10) Containers and other objects for storing or concealing controlled substances;

N.C. Gen. Stat. § 90-113.21(a). Defendant contends that because the indictment was specifically based upon “baggies,” the State was required to present substantial evidence that defendant possessed plastic baggies as drug paraphernalia.

This Court faced a similar issue in the case of *State v. Moore*. In that case:

According to Defendant’s indictment, Defendant allegedly possessed “drug paraphernalia, to wit: a can designed as a smoking device.” However, none of the evidence elicited at trial related to a can; rather, the evidence described

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crack cocaine in a folded brown paper bag with a rubber band around it.

State v. Moore, 162 N.C. App. 268, 273, 592 S.E.2d 562, 565 (2004). Defendant's motion to dismiss the charge was denied, and the trial court granted the State's motion to amend the indictment, replacing the reference to the can with reference to the folded brown paper bag. We held that:

As common household items and substances may be classified as drug paraphernalia when considered in the light of other evidence, in order to [m]ount a defense to the charge of possession of drug paraphernalia, a defendant must be apprised of the item or substance the State categorizes as drug paraphernalia. Accordingly, we conclude the amendment to the indictment constituted a substantial alteration of the charge set forth in the indictment. Moreover, as no evidence of "a can designed as a smoking device" was presented, we conclude the trial court erroneously denied Defendant's motion to dismiss.

Moore, 162 N.C. App. at 274, 592 S.E.2d at 566.

In the instant case, as in *Moore*, defendant was charged with possession of drug paraphernalia, specifically plastic baggies. The only evidence of paraphernalia at trial was of bottles. We hold that the specific items alleged to be drug paraphernalia must be enumerated in the indictment, and that evidence of such items must be presented at trial. Because the State failed to present such evidence, the trial court erred in denying defendant's motion to dismiss the charge of possession of drug paraphernalia.

Since the remaining charges in the consolidated judgments require the imposition of a mandatory sentence, it is unnecessary to resentence defendant. *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009) (adopting dissent from Court of Appeals, 189 N.C. App. 640, 654-55, 659 S.E.2d 79, 88 (2008)).

III. Ineffective Assistance of Counsel

[2] In his second argument, defendant contends that his trial counsel was ineffective. We dismiss this argument without prejudice.

A. Standard of Review

It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on

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[234 N.C. App. 440 (2014)]

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 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) (citations omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

B. Analysis

Defendant contends that his trial counsel proceeded under an inaccurate understanding of the law as to how mixtures of controlled substances are considered for purposes of weight under our drug trafficking statutes. Defendant contends that, as a result, his counsel incorrectly advised him concerning a plea offer. Defendant contends that he relied upon counsel’s advice in pleading not guilty. However, the cold record of the case does not conclusively demonstrate whether defendant received ineffective assistance of counsel. We hold that addressing such a matter would be premature, and dismiss this argument without prejudice to defendant filing a motion for appropriate relief in the trial court.

IV. Conclusion

The charge of possession of drug paraphernalia is vacated, and that issue is remanded to the trial court with instructions to dismiss that charge. The balance of the charges are not challenged upon appeal. Defendant’s contentions concerning ineffective assistance of counsel are dismissed without prejudice.

VACATED AND REMANDED IN PART, DISMISSED IN PART.

Judges HUNTER, Robert C., and BRYANT concur.

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[234 N.C. App. 445 (2014)]

STATE OF NORTH CAROLINA

v.

SAMUEL EUGENE WILLIAMS, JR., DEFENDANT

No. COA13-1221

Filed 17 June 2014

1. Appeal and Error—appealability—motions to dismiss—failure to file notice of appeal or writ of certiorari

Defendant's arguments in a driving while impaired case challenging the trial court's denial of his motions to suppress the results of the alco-sensor and evidence obtained as a result of his arrest based on lack of probable cause were dismissed based on his failure to file a notice of appeal from the trial court's order as required by N.C. R. App. P. 3 or a writ of certiorari.

2. Appeal and Error—certificate—appeal not taken for purposes of delay and evidence necessary

Defendant's motion to dismiss the State's appeal in a driving while impaired case based on the State's alleged failure to meet the certification requirements of N.C.G.S. § 15A-979(c) was denied. Where the State intends to appeal from a trial court's ruling on a motion, the State must file a certificate with the trial court indicating that the State's appeal is not taken for purposes of delay and the evidence sought is necessary to the State's case.

3. Motor Vehicles—driving while impaired—multiple chemical analysis tests—implied consent rights

The trial court did not err in a driving while impaired case by granting defendant's motion to suppress the results of a chemical blood test. Where the State seeks to administer multiple chemical analysis tests to a defendant suspected of driving while impaired, the State must advise the defendant of his implied consent rights prior to the administration of each new test pursuant to N.C.G.S. § 20-16.2(a).

Appeal by the State from order entered 23 July 2013 by Judge Wayland J. Sermons, Jr., in Hyde County Superior Court. Heard in the Court of Appeals 5 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

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The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

BRYANT, Judge.

Pursuant to N.C. Gen. Stat. § 15A-979(c), where the State intends to appeal from a trial court's ruling on a motion, the State must file a certificate with the trial court indicating that the State's appeal is not taken for purposes of delay and the evidence sought is necessary to the State's case. Where the State seeks to administer multiple chemical analysis tests to a defendant suspected of driving while impaired, the State must advise the defendant of his implied consent rights prior to the administration of each new test pursuant to N.C. Gen. Stat. § 20-16.2(a). Where defendant fails to file a notice of appeal pursuant to N.C. R. App. P. 3, defendant's appeal must be dismissed.

On 21 June 2011 at approximately 8:41 p.m., Hyde County Sheriff's Deputy Scott Wilkerson was dispatched to an accident scene on Ocracoke Island involving a fatality and a golf cart. Upon arriving at the scene, Deputy Wilkerson observed a body lying in front of a golf cart and a man, later identified as defendant Samuel Eugene Williams, Jr., standing next to the golf cart. Defendant admitted to driving the golf cart. Deputy Wilkerson testified that defendant had red, glassy eyes, was very talkative, and smelled strongly of alcohol. Defendant told Deputy Wilkerson that he had consumed six beers that afternoon. Deputy Wilkerson administered a portable breath test (alco-sensor) to defendant which yielded a positive result. Defendant was arrested and charged with driving while impaired.

Defendant was transported to the Ocracoke Island Sheriff's Office intoxilyzer room. Deputy Wilkerson read and gave defendant a copy of his implied consent rights; defendant signed the implied consent rights form acknowledging that he understood his rights. After waiting thirty minutes, Deputy Wilkerson, a certified chemical analyst, asked defendant to submit to a chemical analysis of his breath, but defendant refused.

Deputy Wilkerson then requested that a blood testing kit be brought to the office for defendant. Although Deputy Wilkerson did not re-advise defendant of his implied consent rights for the blood test, he gave defendant a consent form for the testing which defendant signed. Defendant's blood was then drawn using the blood testing kit by a paramedic on site.

On 23 May 2012, defendant filed motions to suppress the following: the results of the alco-sensor; evidence obtained as a result of the arrest

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of defendant based on lack of probable cause; defendant's statement that he consumed "3 Jaeger bombs"; and statements made by defendant prior to being advised of his Miranda rights. On 13 June 2012, defendant filed an additional motion to suppress evidence obtained as a result of the chemical analysis of his blood.

On 23 July 2013, the trial court entered a written order denying the following: defendant's motion to suppress the results of the alco-sensor; the motion to suppress evidence obtained as a result of defendant's arrest based on lack of probable cause; and the motion to suppress defendant's statement that he had consumed "3 Jaeger bombs." The trial court granted defendant's motions to suppress the results of the chemical blood test and defendant's statements made prior to being advised of his Miranda rights. The State appeals from the portion of the order granting defendant's motion to suppress the results of the chemical blood test.

[1] Defendant attempts to bring forth issues in his brief on appeal challenging the trial court's order denying his motions to suppress the results of the alco-sensor and evidence obtained as a result of his arrest based on lack of probable cause. However, defendant has not filed a notice of appeal from the trial court's order as required by Rule 3 of our Rules of Appellate Procedure, N.C. R. App. P. 3 (2013), nor has defendant filed a writ of certiorari for review of the issues he attempts to raise. As such, we dismiss defendant's arguments challenging the trial court's denial of his motions. *See State v. May*, 207 N.C. App. 260, 262, 700 S.E.2d 42, 44 (2010) (dismissing appeal where "defendant failed to give timely written notice of appeal").

[2] On 10 January 2014, defendant filed a motion to dismiss the State's appeal, arguing that the State failed to meet the certification requirements of N.C.G.S. § 15A-979(c) because the State addressed its certificate to "the court" rather than to the trial court judge. We disagree.

North Carolina General Statutes, section 15A-979(c) states that:

An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division . . . upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

N.C.G.S. § 15A-979(c) (2013).

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The State noted the following in its certificate, “Certification Under N.C.G.S. § 15A-979(c)”:

THE STATE OF NORTH CAROLINA, by the undersigned assistant district attorney and pursuant to N.C.G.S. §§ [sic] 15A-979(c), having given notice of appeal to the Court of Appeals from the pretrial order of the trial court granting defendant=s [sic] motion to suppress evidence in this case, certifies to the court that the appeal is not taken for the purpose of delay and that the evidence suppressed is essential to the prosecution of the case.

Defendant contends that because N.C.G.S. § 15A-979(c) requires that the certificate be presented to the *judge* who granted the motion, any deviation from this statutory language as presented in the certificate renders the State’s certificate void. Defendant’s argument lacks merit, as the word “judge” can be, and is, synonymous with “the court.”

When construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Wiggs v. Edgecombe Cnty., 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (citations and quotation omitted). We agree with the State that the term “judge” is ambiguous, as “judge” can also mean “court.” See BLACK’S LAW DICTIONARY 405 (9th ed. 2009) (defining “court” as “[a] governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice[,]” or as “[t]he judge or judges who sit on such a governmental body”). Moreover, in looking at the purpose of N.C.G.S. § 15A-979(c), it is clear that this statute is intended to be a procedural safeguard for defendants against the State, rather than an insurmountable burden for the State. Our Courts have held that the certification requirement under N.C.G.S. § 15A-979(c) is paramount in that by failing to file a certificate pursuant to N.C.G.S. § 15A-979(c), the State may not pursue its appeal. See *State v. Judd*, 128 N.C. App. 328, 329-30, 494 S.E.2d 605, 606 (1998) (holding this Court lacked jurisdiction where the State failed to file a certificate as required by N.C.G.S. § 15A-979(c)); *State v. Blandin*, 60 N.C. App. 271, 272-73, 298 S.E.2d 759, 759-60 (1983) (dismissing the State’s appeal for failure to timely file a certificate pursuant

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to N.C.G.S. § 15A-979(c), as “[t]o give the State the right to file the certificate after the case has already been docketed in the appellate court would be to reduce the requirement of the certificate to a nullity. If G.S. § 15A-979(c) means anything at all, it means that the Court is bound to dismiss this appeal.”).

The language of such a certification, however, is not similarly critical. Rather, the certificate must merely acknowledge that the State’s “appeal is not taken for the purpose of delay and that the evidence is essential to the case.” Provided the certificate contains this required statement and is timely filed with the trial court, the actual wording of the certificate in its addressing of the trial court is flexible. *See State v. Turner*, 305 N.C. 356, 359, 289 S.E.2d 368, 370 (1982) (holding that the “two obvious purposes of the certificate [pursuant to N.C.G.S. § 15A-979(c)] are to require the prosecutor to certify that the appeal is not taken for purpose of delay, and that the suppressed evidence is essential to the case”). As it should be clear from the context of N.C.G.S. § 15A-979(c) that in filing a certificate the State is addressing the judge who granted the motion upon which the State wishes to appeal, we find it permissible for the State to use terms such as “judge,” “the court,” “this court,” etc. Accordingly, we deny defendant’s motion to dismiss the State’s appeal.

[3] On appeal, the State argues that the trial court erred in granting defendant’s motion to suppress the results of the chemical blood test. We disagree.

“The standard of review in evaluating a trial court’s ruling on a motion to suppress is that the trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (citation and quotation omitted). Where a trial court’s conclusions of law are supported by findings of fact we will not disturb those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 137-38, 557 S.E.2d 191, 193-94 (2001).

Specifically, the State argues that evidence of the results of the chemical blood test was admissible because although Deputy Wilkerson did not re-advise defendant of his implied consent rights, defendant signed a consent form for the testing.

North Carolina General Statutes, section 20-16.2, Basis for Officer to Require Chemical Analysis; Notification of Rights, holds that:

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Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.

Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:

(1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver[']s license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.

...

(3) The test results, or the fact of your refusal, will be admissible in evidence at trial.

N.C. Gen. Stat. § 20-16.2(a)(1, 3) (2013) (emphasis added).

Deputy Wilkerson read and gave to defendant a copy of his implied consent rights, and defendant signed the form acknowledging he understood these rights. Defendant then refused to take a breath test. Where a defendant refuses to take a breath test, such as here, the State may then seek to administer a different type of chemical analysis such as a blood test pursuant to North Carolina General Statutes, Section 20-139.1(b5), Subsequent Tests Allowed:

A person may be requested, pursuant to G.S. 20-16.2, to submit to a chemical analysis of the person's blood or other bodily fluid or substance in addition to or in lieu of a chemical analysis of the breath, in the discretion of a law enforcement officer *If a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a).* A person's willful refusal to

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submit to a chemical analysis of the blood or other bodily fluid or substance is a willful refusal under G.S. 20-16.2. If a person willfully refuses to provide a blood sample under this subsection, . . . then a law enforcement officer with probable cause to believe that the offense involved impaired driving or was an alcohol-related offense made subject to the procedures of G.S. 20-16.2 shall seek a warrant to obtain a blood sample.

N.C. Gen. Stat. §20-139.1(b5) (2013) (emphasis added). N.C.G.S. §§ 20-16.2 and 20-139.1 must be read *in pari materia* “to determine the procedures governing the administering of chemical analyses.” *Nicholson v. Killens*, 116 N.C. App. 473, 478, 448 S.E.2d 542, 544 (1994). “However, we conclude that G.S. 20-16.2, and that statute alone, sets forth the procedures governing notification of rights pursuant to a chemical analysis.” *Id.* at 478, 448 S.E.2d at 544-45. As such, although the State is correct in asserting that it could seek to administer a blood test to defendant after defendant refused to take a breath test¹, the State was required, pursuant to the mandates of N.C.G.S. § 20-16.2(a) and as reiterated by N.C.G.S. § 20-139.1(b5), to re-advise defendant of his implied consent rights before requesting he take a blood test. This is particularly important when, as here, defendant had refused a breath test after being advised of his rights and acknowledging them. “Statutes imposing a penalty are to be strictly construed[.]” *Id.* at 477, 448 S.E.2d at 544 (citation omitted); *see also State v. Gray*, 28 N.C. App. 506, 506-07, 221 S.E.2d 765, 765-66 (1976) (holding that failure of the State to show a breathalyzer test was properly administered required the suppression of all evidence stemming from that test); *State v. Shadding*, 17 N.C. App. 279, 283, 194 S.E.2d 55, 57 (1973) (“The failure [of the State] to establish that defendant was accorded his statutory rights rendered the results of the breathalyzer test inadmissible in evidence, and its admission over objection constituted prejudicial error.”); *State v. Warf*, 16 N.C. App. 431, 431-32, 192 S.E.2d 37, 38 (1972) (holding that where the State fails to carry its burden of showing that a breathalyzer test was properly administered, evidence of that test must be suppressed). Accordingly, the trial court did not err in granting defendant’s motion to suppress as to the chemical blood test.

The State further argues that even if N.C.G.S. § 20-139.1(b)(5) is applicable, the trial court erred in granting defendant’s motion to suppress because any statutory violation was “technical and not substantial

1. The statute clearly provides that upon a defendant’s refusal to provide a blood sample as requested, law enforcement may seek a warrant to obtain the blood sample for testing. N.C.G.S. § 20-139.1(b5).

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and the defendant has shown no prejudice” because defendant had been advised of his implied consent rights as to the breath test “less than an hour before the blood test.” The State cites *State v. Green*, 27 N.C. App. 491, 219 S.E.2d 529 (1975), and *State v. Buckner*, 34 N.C. App. 447, 238 S.E.2d 635 (1977), in support of its argument.

In *Green*, the defendant alleged that the arresting officer’s “garbled” reading of the defendant’s implied consent rights violated N.C.G.S. § 20-16.2. This Court disagreed, finding that the arresting officer’s reading of the defendant’s implied consent rights, coupled with the defendant receiving a printed copy of those rights and signing a consent form prior to taking a breath test, was sufficient. *Green*, 27 N.C. App. at 494-95, 219 S.E.2d at 531-32.

In *Buckner*, the defendant was properly read and given a copy of his implied consent rights but did not sign a form acknowledging his understanding of these rights before he took a breath test. This Court found that the breath test was admissible into evidence as it was clear from the record that the defendant was properly instructed as to his rights and failed to exercise those rights. *Buckner*, 34 N.C. App. at 451, 238 S.E.2d at 638.

Both *Green* and *Buckner* are distinguishable from the instant case. In *Green* and *Buckner*, each defendant was advised of his implied consent rights before being asked to take a single chemical analysis – a breath test. In each case, the technical deficiencies raised by the defendants did not override the facts showing each defendant was advised of and given copies of his implied consent rights prior to testing. Here, defendant was advised of his implied consent rights and thereafter refused to take the initial chemical breath test. When the State then sought to administer a second chemical analysis, a blood test, defendant was not advised of his implied consent rights as to that test. A failure to advise cannot be deemed a mere technical and insubstantial violation. The State was *required* to re-advise defendant of his implied consent rights prior to the second chemical analysis test – a blood test. Since “[s]tatutes imposing a penalty are to be strictly construed[,]” the State’s failure to adhere to the requirements of N.C.G.S. §§ 20-16.2 and 20-139.1 must result in suppression of the results of the blood test. Accordingly, the State’s argument is overruled.

Affirmed.

Judges STEPHENS and DILLON concur.

TOBE-WILLIAMS v. NEW HANOVER CNTY. BD. OF EDUC.

[234 N.C. App. 453 (2014)]

TIFFANY N. TOBE-WILLIAMS, PETITIONER

v.

NEW HANOVER COUNTY BOARD OF EDUCATION; A/K/A NEW HANOVER
COUNTY SCHOOLS, RESPONDENT

No. COA13-679

Filed 17 June 2014

1. Appeal and Error—preservation of issues—jurisdiction—waiver

The trial court properly asserted jurisdiction over a board of education, and the appeal was reviewed on the merits, where the board submitted to the jurisdiction of the trial court and waived its personal jurisdiction defense by failing to raise jurisdiction at the hearing and by arguing the merits of the case.

2. Schools and Education—assistant principal—reinstatement—notice and opportunity to be heard

A trial court order requiring that an assistant principal be reinstated was remanded where the superintendent had recommended renewal but the Board of Education (Board) decided otherwise after conducting its own investigation and effectively conducting a hearing without notice or participation by petitioner. On remand, the Board is to reach a decision after properly allowing petitioner an opportunity to be heard regarding the information that the Board intends to consider that was not included in her personnel file at the time the superintendent recommended renewal of her contract.

Appeal by respondent from order entered 4 January 2013 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 7 November 2013.

The Leon Law Firm, P.C., by Mary-Ann Leon; and The McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellee.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for respondent-appellant.

N.C. School Boards Association, by Allison B. Schafer and Christine T. Scheef, for Amicus Curiae North Carolina School Boards Association.

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[234 N.C. App. 453 (2014)]

N.C. Association of Educators, by Ann McColl and Carrie Bumgardner, for Amicus Curiae North Carolina Association of Educators.

GEER, Judge.

Respondent New Hanover County Board of Education (“the Board”) appeals from an order reversing the Board’s decision not to renew the contract of petitioner Tiffany N. Tobe-Williams. We conclude that the process employed by the Board in reaching its decision violated Ms. Tobe-Williams’ procedural rights under N.C. Gen. Stat. § 115C-287.1(d) (2013) and under N.C. Gen. Stat. § 115C-325(b) (2013) when it based its decision not to renew Ms. Tobe-Williams’ contract on evidence not contained in her personnel file and without giving her notice of that evidence and an opportunity to respond to it. Accordingly, we affirm the trial court’s conclusion that the Board’s decision was made upon unlawful procedure.

However, the grounds for nonrenewal asserted by the Board are not arbitrary, capricious, personal, or political, and the record contains evidence that would support the Board’s decision even though some of the Board’s specific findings of fact are unsupported. We, therefore, reverse the trial court’s order of reinstatement and remand to the Board for reconsideration of its decision after giving Ms. Tobe-Williams notice of the information that the Board intends to consider in making its decision and an opportunity to respond to that evidence.

Facts

Ms. Tobe-Williams was employed by the Board as an assistant principal in the New Hanover County School District under a four-year contract from July 2008 to 30 June 2012. During the 2008-2009 academic year, Ms. Tobe-Williams worked at Myrtle Grove Middle School. During the course of that academic year, Ms. Tobe-Williams’ relationship with her immediate supervisor, principal Robin Meiers, deteriorated due, in large part, to Ms. Tobe-Williams’ concerns about the financial practices of the school treasurer, which Ms. Tobe-Williams believed were not in compliance with Board policies. Although Ms. Tobe-Williams expressed her concerns to Ms. Meiers on several occasions, she did not feel that Ms. Meiers adequately addressed the problem. The Human Resources Department encouraged Ms. Tobe-Williams to work with Ms. Meiers to resolve the issues.

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On 19 June 2009, Ms. Tobe-Williams attempted to file a grievance by emailing Dr. John A. Welmers, Jr., the assistant superintendent for Human Resources, and expressing her dissatisfaction with the lack of response or guidance from Human Resources regarding her allegations of unethical financial practices. In the email, Ms. Tobe-Williams stated that if the matter was not resolved by the following Tuesday, she would contact the Department of Public Instruction to request a full investigation. She indicated that “resolved MINIMALLY mean[t],” among other things, that she be transferred to another school.

Dr. Welmers responded that Ms. Tobe-Williams’ allegations concerning the treasurer were being investigated and that an internal auditor and Ms. Meiers had taken “personnel action concerning the improvement of the treasurer’s performance and put in place steps to ensure that the treasurer meets all of the school system’s guidelines and regulations” Dr. Welmers notified Ms. Tobe-Williams that her email did not constitute a formal grievance and explained to Ms. Tobe-Williams the guidelines of the Board’s formal grievance policy, concluding that “[i]f you believe one of these conditions [for which a grievance may be filed] exists that has not already been addressed by the school system, you certainly have every right to begin the formal grievance procedure.”

On 10 July 2009, Ms. Tobe-Williams filed a formal grievance against Ms. Meiers, Dr. Welmers, and Dr. Susan Hahn, the Director of Human Resources. On 19 August 2009, then-superintendent Dr. Alfred H. Lerch, Jr. granted Ms. Tobe-Williams a transfer to Wrightsville Beach Elementary School (“WBES”), and Ms. Tobe-Williams agreed to drop her grievance. Superintendent Lerch requested that Ms. Meiers not complete an evaluation for Ms. Tobe-Williams for the 2008-2009 academic year.

During the 2009-2010 academic year, Ms. Tobe-Williams had a successful year as an assistant principal at WBES, working under Principal Pansy R. Rumley. During her second year at WBES, on 21 and 25 January 2011, Ms. Tobe-Williams suffered allergic reactions while participating in a school clean up. Ms. Tobe-Williams came to believe that these allergic reactions and her subsequent health issues were related to the uncleanliness of the school and the possibility of black mold growing in the building. On 1 February 2011, Ms. Tobe-Williams’ doctor wrote her a note stating she “needs time off from school until dust and black (mold?) [sic] cleaned up.”

In response to an incident report relating to Ms. Tobe-Williams, the New Hanover County Schools Maintenance Operations Department completed an indoor air quality (“IAQ”) observation report on 28 January

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2011. The N.C. Department of Environmental and Natural Resources Division of Environmental Health also inspected the school on 16 February 2011, while the New Hanover County Health Department conducted an inspection and tested for mold, allergens, and other health issues on 22 February 2011. None of the reports from these inspections indicated that mold was present in the school.

On 23 February 2011, Ms. Tobe-Williams met with Dr. Welmers; Mr. Bill Hance, the assistant superintendent of maintenance; and Dr. Jim Markley, the new superintendent of New Hanover County Schools. At the meeting, Ms. Tobe-Williams expressed her concerns regarding the presence of mold, the lack of cleanliness of WBES, and her dissatisfaction with the administration's response to her concerns. She believed the administration had deceived her by failing to timely provide her with information concerning the mold investigation, by failing to return her emails, and by not sharing with her pictures of the school that Mr. Hance had taken. Ms. Tobe-Williams requested that an IAQ examination be done at the school.

Mr. Hance explained to Ms. Tobe-Williams that no mold or other significant health issues had been found at the school by the Health Department. Regarding the cleanliness of WBES, Dr. Markley acknowledged that WBES's previous inspection reports showed that WBES had received the lowest overall score in the school system, but he explained that WBES nevertheless met the school system's general guidelines for cleanliness.

On 25 February 2011, Dr. Markley temporarily transferred Ms. Tobe-Williams to Alderman Elementary School ("AES"), effective 28 February 2011, to fill the position of an assistant principal who was on maternity leave. His letter to Ms. Tobe-Williams indicated the transfer was "as a precaution for your health and safety due to the fact that you have alleged that you have become sick at work and that you believe it is due to poor indoor air quality . . . at [WBES]" He told Ms. Tobe-Williams that they were having the IAQ at WBES tested and that he would reassess her assignment once he received the results.

Ms. Tobe-Williams did not report to work at AES. Instead, she filed a grievance against Dr. Markley and sent an email to the Board's attorney maintaining that the transfer was "in violation of federal OSHA regulations which prohibit employers from transferring employees due to workplace hazard complaints." She informed Dr. Markley that she would be out the first week of her temporary transfer due to multiple doctor appointments.

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Additional IAQ testing of WBES was completed by Phoenix EnviroCorp on 25 February 2011, 7 March 2011, and 11 March 2011. Mr. Hance notified Ms. Tobe-Williams when he received the testing reports from Phoenix EnviroCorp and made copies of the reports available to Ms. Tobe-Williams. The results revealed that there were elevated levels of mold in one classroom, mobile classroom seven (“MC-7”). Phoenix EnviroCorp also conducted carbon dioxide monitoring in all the classrooms on 11 March 2011. The report concluded that the readings indicated “possible ventilation issues,” but noted that all the measurements were “well below” the OSHA Permissible Exposure Limit and the NIOSH Recommended Exposure limit for carbon dioxide. On Saturday, 12 March 2011, custodians throughout the New Hanover County School District conducted a “thorough cleaning” of WBES from 7:00 a.m. until 4:00 p.m.

On 22 March 2011, Ms. Rumley sent a letter to the parents of the students assigned to MC-7 explaining why the students had been moved from MC-7 to the library. The letter explained that the school was replacing the HVAC unit and that “[o]nce everything is operational and a final air quality inspection is approved, the students will return to MC-7.” Chris Peterson, the director of maintenance operations, reviewed the letter prior to its being sent to the parents and concluded that the information in the letter was accurate.

On 24 March 2011, Dr. Markley informed Ms. Tobe-Williams that the maintenance department had completed a thorough cleaning of the school, and the air quality in the building was “good” with respect to levels of carbon dioxide and mold. He noted that the most recent tests had indicated that elevated mold spore levels were only found in one location, MC-7, and were “not elevated to a significant degree.” As a “precautionary measure,” Dr. Markley requested that Ms. Tobe-Williams not work in that area until further testing had been completed. Dr. Markley requested that Ms. Tobe-Williams return to WBES on 28 March 2011 unless her doctor advised her not to. Additionally, he noted that “[i]f your doctor states that you should not return to that specific building or upon your return you experience any difficulties with breathing, anaphylaxis, or other health conditions, we will take that information into consideration for accommodating your condition which may involve making other arrangements for your work site.”

Ms. Tobe-Williams returned to work, and continued to pursue her grievances against WBES regarding cleanliness and IAQ. On 10 May 2011, Ms. Tobe-Williams testified and presented evidence at a hearing before the Board. After considering all the evidence presented at the

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hearing, the Board adopted and sent Ms. Tobe-Williams a written resolution, which concluded that Ms. Tobe-Williams' concerns did not rise to the level of a valid grievance.

After the hearing, Ms. Tobe-Williams continued to raise complaints about the conditions at WBES, including a complaint on 25 May 2011 that a window in the media center had been screwed shut and posed a fire hazard. Ms. Tobe-Williams believed that the window was purposefully screwed shut as retaliation against her. The screws were removed promptly upon Ms. Tobe-Williams' request.

The following day, 26 May 2011, Ms. Tobe-Williams, appearing "visibly angry," confronted Ms. Rumley in her office and told Ms. Rumley that "she was the angriest that she had ever been, and it was up to [Ms. Rumley] whether the next ten days would be pleasant and amicable or not" and that Ms. Tobe-Williams "could make life miserable by going to the news media regarding the issues with Mobile Classroom 7." Specifically, Ms. Tobe-Williams was upset about the window being screwed shut and about the letter that Ms. Rumley had sent to parents regarding MC-7. Ms. Tobe-Williams called Ms. Rumley a "liar" for stating in the letter that MC-7 had received "A" ratings on health department inspections.

Regarding the window, Ms. Rumley informed Ms. Tobe-Williams that maintenance had screwed the window shut in an attempt to follow the energy policy of not opening windows when the air-conditioning was on. Ms. Rumley also produced for Ms. Tobe-Williams the inspection reports that she believed showed the "A" ratings for MC-7. Ms. Tobe-Williams explained that the "A" did not refer to the rating, but rather the "status code." Following the meeting, Ms. Rumley notified Dr. Markley that she had misinterpreted the information on the inspection reports.

Due to a reduction in funding, Ms. Tobe-Williams was transferred to Ogden Elementary School ("OES") as an assistant principal for the 2011-2012 school year. Ms. Tobe-Williams completed the year under Principal Tammy Bruestle and received "Proficient" and "Accomplished" ratings on her final evaluation. The evaluation noted, however, that Ms. Tobe-Williams could "be intimidating to staff members especially if they are under performing [sic]."

At a Board meeting on 5 June 2012, Dr. Markley submitted to the Board a list of principals and assistant principals, including Ms. Tobe-Williams, with a recommendation that the Board renew their contracts. Prior to the Board's vote on the contracts, however, the Board requested additional time to review Ms. Tobe-Williams' personnel file and other records concerning Ms. Tobe-Williams' performance over the course of

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her four-year contract “because [the Board] was aware of serious concerns about” Ms. Tobe-Williams. As a result, the superintendent removed Ms. Tobe-Williams’ name from consideration, and the Board did not vote on her contract at the 5 June 2012 meeting.

After the 5 June 2012 meeting, the Board reviewed Ms. Tobe-Williams’ personnel file, other information maintained by the New Hanover County Schools’ Human Resources Department, and a memorandum submitted by Ms. Meiers regarding Ms. Tobe-Williams’ performance during the 2008-2009 school year. Ms. Tobe-Williams was not contacted by the Board during this time. At the 10 July 2012 meeting, the superintendent again recommended that Ms. Tobe-Williams’ contract be renewed. Nonetheless, the Board unanimously voted not to renew Ms. Tobe-Williams’ contract and adopted a written resolution reflecting its decision.

Ms. Tobe-Williams appealed the nonrenewal decision to New Hanover County Superior Court on the grounds that the decision was arbitrary and capricious, not supported by substantial evidence, in excess of statutory authority, and affected by errors of law. The matter was heard on 17 December 2012 by the trial court. On 4 January 2013, the court entered an order reversing the Board’s decision on the grounds that it was not supported by substantial evidence in the record, was arbitrary and capricious, and was based upon unlawful procedure in violation of N.C. Gen. Stat. § 115C-287.1. The Board timely appealed to this Court.

Discussion

“On appeal of a decision of a school board, a trial court sits as an appellate court and reviews the evidence presented to the school board.” *Davis v. Macon Cnty. Bd. of Educ.*, 178 N.C. App. 646, 651, 632 S.E.2d 590, 594 (2006). The Board’s decision not to renew an assistant principal’s employment contract is subject to judicial review in accordance with Article 4 of the North Carolina Administrative Procedure Act (“APA”). N.C. Gen. Stat. § 115C-287.1(d).

Under Article 4, N.C. Gen. Stat. § 150B-51(b) (2013), a trial court may reverse or modify the agency decision if it is:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;

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- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

Errors alleged under subsections (1) through (4) are reviewed de novo. N.C. Gen. Stat. § 150B-51(c). “When conducting de novo review, the court considers the matter anew and may freely substitute its own judgment for the board’s.” *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 185 N.C. App. 566, 572, 649 S.E.2d 410, 415 (2007).

The whole record test applies to claims that the Board’s decision was unsupported by substantial evidence or was arbitrary, capricious, or an abuse of discretion. *Davis*, 178 N.C. App. at 652, 632 S.E.2d at 594. “Pursuant to the whole record test, the reviewing court examines all competent evidence to determine whether a school board’s decision was based upon substantial evidence.” *Id.* “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State ex rel. Comm’r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977).

“A court applying the whole record test may not substitute its judgment for the agency’s as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*.” *Watkins v. N.C. State Bd. of Dental Exam’rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). “Only when there is no substantial evidence supporting administrative action should the court reverse an agency’s ruling.” *Mendenhall v. N.C. Dep’t of Human Res.*, 119 N.C. App. 644, 650, 459 S.E.2d 820, 824 (1995).

This Court reviews the trial court’s order for error of law. *Moore*, 185 N.C. App. at 572-73, 649 S.E.2d at 415. “Our task is essentially twofold: ‘(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.’” *Id.* at 573, 649 S.E.2d at 415 (quoting *Alexander v. Cumberland Cnty. Bd. of Educ.*, 171 N.C. App. 649, 655, 615 S.E.2d 408, 413 (2005)).

I

[1] The Board first argues that the trial court erred in failing to dismiss the petition for lack of personal jurisdiction. The APA provides that “the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision.” N.C. Gen. Stat.

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§ 150B-45(a) (2013). Additionally, “[w]ithin 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings.” N.C. Gen. Stat. § 150B-46 (2013).

Here, Ms. Tobe-Williams filed her petition on 9 August 2012, but the Board was not served by personal service or by certified mail until 5 September 2012, more than 10 days later. Service was, therefore, defective. In the Board’s response to the petition, the Board asserted the defenses of insufficiency of process, insufficiency of service, and lack of personal jurisdiction pursuant to Rules 12(b)(4), (5), and (6) of the Rules of Civil Procedure, and moved to dismiss the petition.

However, the issue of service and personal jurisdiction over the Board was not raised by either party at the 17 December 2012 hearing, and both parties presented arguments concerning the merits of the case. The Board did not request a ruling on its motion to dismiss, and the trial court proceeded to enter a decision on the merits.

“Jurisdiction over the person of a defendant can be acquired only in two ways: (1) By service of process upon him, whereby he is brought into court against his will; and (2) by his voluntary appearance and submission.” *In re Blalock*, 233 N.C. 493, 503, 64 S.E.2d 848, 855 (1951).

An appearance merely for the purpose of objecting to the lack of any service of process or to a defect in the process or in the service of it, is a special appearance. In such case the defendant does not submit his person to the jurisdiction of the court.

On the other hand, a general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person.

A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof.

Id. at 503-04, 64 S.E.2d at 855-56 (internal citations omitted).

In this case, by failing to raise the issue of jurisdiction at the hearing and by arguing the merits of the case, the Board submitted to the jurisdiction of the trial court and waived its personal jurisdiction defense.

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Accordingly, we hold that the trial court properly asserted jurisdiction over the Board, and we review the merits of this appeal.

II

[2] The Board next contends that the trial court erred in concluding that the Board's decision was made upon unlawful procedure. Because this question raises issues of law, we review it de novo.

The procedure for hiring school administrators, including assistant principals, is set out in N.C. Gen. Stat. § 115C-287.1. A school administrator is employed by the local board of education "upon the recommendation of the superintendent" for an initial contract term of up to four years "ending on June 30 of the final 12 months of the contract." N.C. Gen. Stat. § 115C-287.1(b). During the term of the contract, a school administrator may not be dismissed or demoted "except for the grounds and by the procedure by which a career teacher may be dismissed or demoted as set forth in G.S. 115C-325." N.C. Gen. Stat. § 115C-287.1(c). This procedure includes the "right to receive notice of an adverse recommendation by the superintendent, to be heard before a case manager and/or the board of education, to present evidence, and generally to defend against whatever the charges or allegations might be." *Moore*, 185 N.C. App. at 570, 649 S.E.2d at 413-14 (citing N.C. Gen. Stat. § 115C-325(h)-(j3) (2005)).

However, the General Assembly has provided a different procedure for the decision whether to renew a school administrator's contract. If the superintendent intends to recommend that the school administrator's contract be renewed, the superintendent must "submit the recommendation to the local board for action," and the Board "may approve the superintendent's recommendation or decide not to offer the school administrator a new, renewed, or extended school administrator's contract." N.C. Gen. Stat. § 115C-287.1(d).

On the other hand,

[i]f a superintendent decides not to recommend that the local board of education offer a new, renewed, or extended school administrator's contract to the school administrator, the superintendent shall give the school administrator written notice of his or her decision and the reasons for his or her decision no later than May 1 of the final year of the contract. The superintendent's reasons may not be arbitrary, capricious, discriminatory, personal, or political. No action by the local board or further notice

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to the school administrator shall be necessary unless the school administrator files with the superintendent a written request, within 10 days of receipt of the superintendent's decision, for a hearing before the local board. Failure to file a timely request for a hearing shall result in a waiver of the right to appeal the superintendent's decision. If a school administrator files a timely request for a hearing, the local board shall conduct a hearing pursuant to the provisions of G.S. 115C-45(c) and make a final decision on whether to offer the school administrator a new, renewed, or extended school administrator's contract.

If the local board decides not to offer the school administrator a new, renewed, or extended school administrator's contract, the local board shall notify the school administrator of its decision by June 1 of the final year of the contract. *A decision not to offer the school administrator a new, renewed, or extended contract may be for any cause that is not arbitrary, capricious, discriminatory, personal, or political.*

Id. (emphasis added).

Thus, when the superintendent recommends nonrenewal, the school administrator is entitled to notice of the grounds for the nonrenewal recommendation and, upon timely request, to a hearing before the Board. However, when the superintendent recommends renewal, the statute is silent as to the procedure by which the Board may accept or reject the recommendation and, more specifically, as to the school administrator's right to notice and a hearing.

We are not required to decide, in this case, whether a Board must conduct a full-blown hearing whenever a superintendent recommends renewal but the Board decides otherwise. It is apparent that the procedure that the Board used in this case is not one authorized by the statute and is not consistent with Chapter 115C when read as a whole.

In construing other provisions of Chapter 115C of the North Carolina General Statutes, our Supreme Court has emphasized:

“In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity

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of the law, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion.”

Taborn v. Hammonds, 324 N.C. 546, 553, 380 S.E.2d 513, 517 (1989) (quoting *Faulkner v. New Bern–Craven Cnty. Bd. of Educ.*, 311 N.C. 42, 58, 316 S.E.2d 281, 290–91 (1984)).

The Supreme Court further emphasized that when construing provisions in Chapter 115C, the following well-established principle of statutory construction applies: “[A]ll statutes relating to the same subject matter shall be construed *in pari materia* and harmonized if this end can be attained by any reasonable interpretation.” *Id.* (quoting *Faulkner*, 311 N.C. at 58, 316 S.E.2d at 291)). Accordingly, in deriving the meaning of a particular provision of Chapter 115C, “we must examine it in the general context of North Carolina’s public school laws” *Id.*, 380 S.E.2d at 517-18.

In *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975), the Supreme Court held that “[t]he manifest purpose” of the statute then governing employment of teachers “was to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons.” It follows that the manifest purpose of N.C. Gen. Stat. § 115C-287.1(d) in prohibiting the nonrenewal of administrators’ employment contracts for “arbitrary, capricious, discriminatory, personal, or political” reasons is to ensure that North Carolina’s schools are staffed with administrators of proven ability.

The procedural protections explicitly provided in N.C. Gen. Stat. § 115C-287.1(d) further this purpose. Specifically, the notice of an adverse recommendation by the superintendent alerts the school administrator that her future employment status is at risk and, more importantly, of the potential grounds for nonrenewal. The school administrator may then request a hearing before the school board in order to have an opportunity to contest the validity of the asserted grounds for nonrenewal and to specifically address the concerns of the superintendent and the school board.

In this case, however, the superintendent recommended the renewal of Ms. Tobe-Williams’ contract and, therefore, the statute did not expressly require that she be given an opportunity to request a hearing. The Board urges that it was, under the plain language of N.C. Gen. Stat. § 115C-287.1, free, without conducting a hearing, to “decide[] not to offer the school administrator a new, renewed, or extended school

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administrator's contract." However, in this case, the Board did not simply reject the superintendent's recommendation.

Instead, the Board determined that it needed more information. As its resolution regarding the nonrenewal of Ms. Tobe-Williams' contract stated, the Board, upon receipt of the superintendent's 5 June 2012 recommendation, "chose not to renew Ms. Tobe-Williams' contract at that time because it was aware of serious concerns about Ms. Tobe-Williams. The Board asked for an opportunity to review documentation of Ms. Tobe-Williams' performance and conduct." The resolution indicated that the Board members "then reviewed extensive documentation concerning Ms. Tobe-Williams which was maintained by the Human Resources Department, including rebuttals and explanations provided by Ms. Tobe-Williams." At the 12 July 2012 Board meeting, "Board Members discussed Ms. Tobe-Williams' performance and conduct with the Superintendent *and others* and discussed the documentation they had reviewed." (Emphasis added.)

Nothing in the Board's resolution indicates that it limited its review to materials in Ms. Tobe-Williams' personnel file -- materials of which Ms. Tobe-Williams would have had notice. See N.C. Gen. Stat. § 115C-325(b) (2013) (providing "[t]he personnel file shall be open for the teacher's inspection at all reasonable times" and requiring five days' notice to teachers before material is placed in personnel file). Indeed, even though, after a dispute arose between principal Robin Meiers and Ms. Tobe-Williams, a prior superintendent had expressly determined that Ms. Meiers should not prepare an evaluation for academic year 2008-2009, Ms. Meiers was asked to provide the Board with a memo describing, three years after the fact, what Ms. Tobe-Williams' ratings would have been had Ms. Meiers evaluated her formally.¹ Moreover, our review of the administrative record suggests that additional documentation reviewed by the Board was likely not included in Ms. Tobe-Williams' personnel file prior to the superintendent's having recommended her renewal.

Review of the Board's resolution also reveals that the Board in fact relied on documentation, including Ms. Meiers' memo, in making its nonrenewal decision. The Board even found that "[f]urther investigation *by the Board* has revealed that at least two teachers at Ogden

1. Significantly, as the formal evaluations in Ms. Tobe-Williams' personnel file indicate, if Ms. Meiers had prepared a formal evaluation, Ms. Tobe-Williams would have seen the evaluation and had an opportunity to comment in writing.

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Elementary School asked the Principal not to let Ms. Tobe-Williams evaluate them because Ms. Tobe-Williams had intimidated them and they did not believe they could be evaluated fairly by Ms. Tobe-Williams.” (Emphasis added.) In short, the Board conducted, unbeknownst to Ms. Tobe-Williams, its own investigation and then, at a Board meeting, interviewed unspecified witnesses about her performance and discussed documentation related to that performance. In other words, the Board effectively conducted a hearing without notice to or participation by Ms. Tobe-Williams.

The procedure followed by the Board in this case – in which the Board conducted its own investigation, solicited the creation of documentation, reviewed documentation not contained in the personnel file, and interviewed witnesses – is not specifically authorized by the statute and is not consistent with Chapter 115C when read as a whole. Moreover, our research has failed to uncover any decision by our courts suggesting that such a procedure is permissible.

N.C. Gen. Stat. § 115C-325 “governs the hiring, firing, tenure and resignations of public schoolteachers; and its definition of ‘teacher’ includes those who directly supervise teaching,” such as principals and assistant principals. *Warren v. Buncombe Cnty. Bd. of Educ.*, 80 N.C. App. 656, 658, 343 S.E.2d 225, 226 (1986). *Before setting out the procedures for the hiring and firing of employees*, the statute provides the following regarding personnel files:

The superintendent shall maintain in his office a personnel file for each teacher that contains any complaint, commendation, or suggestion for correction or improvement about the teacher’s professional conduct, except that the superintendent may elect not to place in a teacher’s file (i) a letter of complaint that contains invalid, irrelevant, outdated, or false information or (ii) a letter of complaint when there is no documentation of an attempt to resolve the issue. The complaint, commendation, or suggestion shall be signed by the person who makes it *and shall be placed in the teacher’s file only after five days’ notice to the teacher. Any denial or explanation relating to such complaint, commendation, or suggestion that the teacher desires to make shall be placed in the file. Any teacher may petition the local board of education to remove any information from his personnel file that he deems invalid, irrelevant, or outdated. The board may order the*

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superintendent to remove said information if it finds the information is invalid, irrelevant, or outdated.

N.C. Gen. Stat. § 115C-325(b) (emphasis added).

Thus, employees, including administrators, are expressly provided notice of the inclusion of any materials in their personnel files and receive an opportunity to address those materials. It is evident by the inclusion of this provision at the beginning of N.C. Gen. Stat. § 115C-325 – the section of Chapter 115C governing employment contracts – that the General Assembly intended to protect employees from the inclusion of unfair, untrue, incomplete, or outdated information in their personnel files that might adversely affect their employment status. This provision is also inconsistent with a construction of N.C. Gen. Stat. § 115C-287.1(d) that would allow a school board unfettered discretion regarding what it may consider when making an employment decision without a hearing.

While we recognize that school boards have wide discretion to consider evidence introduced at a hearing, *Baxter v. Poe*, 42 N.C. App. 404, 409, 257 S.E.2d 71, 74-75 (1979) (“While a Board of Education conducting a hearing . . . must provide all essential elements of due process, it is permitted to operate under a more relaxed set of rules than is a court of law[.]”), there was no hearing in this case. Therefore, the Board’s decision was based, at least in part, upon information – including documentation and interviews – to which Ms. Tobe-Williams had never been given any opportunity to respond. We cannot conclude that the General Assembly intended such a result given the careful protections that the legislature has granted regarding the contents of an employee’s personnel file.

Further, “[i]t is fully established that the language of a statute will be interpreted so as to avoid an absurd consequence. . . . Where a literal reading of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.” *Taylor*, 286 N.C. at 496, 212 S.E.2d at 386 (internal quotation marks omitted).

In N.C. Gen. Stat. § 115C-287.1(d), the General Assembly has specifically provided for a hearing before the Board only if the superintendent has recommended nonrenewal, as the Board argues. Nevertheless, to allow the Board, when the superintendent has in fact *recommended renewal*, to conduct its own investigation, to consider documentation outside of the administrator’s personnel file, and to question witnesses without notice to the administrator, would lead to an absurd

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consequence that is inconsistent with “[t]he manifest purpose” of the statute to provide administrators “of proven ability for the children of this State by protecting such [administrators] from dismissal for political, personal, arbitrary or discriminatory reasons.” *Taylor*, 286 N.C. at 496, 212 S.E.2d at 386.

The construction urged by the Board in this case would provide extensive procedural protections to an administrator whose performance was poor enough to merit a nonrenewal recommendation from the superintendent, but deny an administrator actually recommended for renewal by the superintendent of any opportunity to ensure simply that information considered by the Board was not “invalid, irrelevant, [or] outdated,” N.C. Gen. Stat. § 115C-325(b), or “arbitrary, capricious, discriminatory, personal, or political,” N.C. Gen. Stat. § 115C-287.1(d).

Furthermore, the Board’s construction would grant more procedural protection when the concerns originated with the superintendent, whose recommendation is only advisory, than when the concerns originated with those who have the ultimate decision making authority – the Board itself. *See Abell v. Nash Cnty. Bd. of Educ.*, 71 N.C. App. 48, 52, 321 S.E.2d 502, 506 (1984) (holding that superintendent’s recommendation for renewal of probationary teacher is only advisory and “ultimate responsibility rests with the board”).

We recognize that in the context of a renewal of a probationary teacher’s contract, this Court rejected the teacher’s argument that she had a statutory right to a hearing where “N.C. Gen. Stat. § 115C-325(m) (2) [(2005)] – the provision specifically setting forth the rights of probationary teachers – fails to expressly provide any right to a hearing before the Board.” *Moore*, 185 N.C. App. at 573, 649 S.E.2d at 415.

This Court explained that, in contrast to the provision providing the rights of probationary teachers, the General Assembly expressly requires prior notice to school administrators and career teachers from the superintendent “regarding a recommendation that may adversely affect the employee’s future status.” *Id.* at 574, 649 S.E.2d at 415. In reference to the provisions of N.C. Gen. Stat. § 287.1(d), the Court reasoned “[t]he existence of language granting administrators the right to a hearing ‘pursuant to the provisions of G.S. 115C-45(c)’ confirms that when the General Assembly intended to afford notice and hearing rights, it did so in unambiguous terms.” 185 N.C. App. at 577-78, 649 S.E.2d at 418.

In *Moore*, however, the contract renewal procedures in N.C. Gen. Stat. § 115C-325(m)(2) (2005) did not provide notice and hearing rights

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to probationary teachers under any circumstances, thus showing an intent on the part of the General Assembly to treat probationary teachers differently from school administrators and career teachers and provide them with less procedural protection. Here, in contrast to *Moore*, the question is not whether the General Assembly intended to afford school administrators, as a class of employee, with notice and hearing rights in the contract renewal process, but rather under what circumstances are such procedural protections triggered. To hold that when a superintendent recommends renewal, a Board may conduct its own investigation, and an administrator has no right to notice or an opportunity to be heard in any form regarding that investigation, would be an absurd result inconsistent with other provisions in Chapter 115C. We decline to adopt such a construction of N.C. Gen. Stat. § 115C-287.1(d).

Reading N.C. Gen. Stat. § 115C-287.1(d) *in pari materia* with other provisions in Chapter 115C and considering the overall purpose of N.C. Gen. Stat. § 115C-287.1(d), as directed by *Taylor* and *Taborn*, we hold that in deciding whether “to offer the school administrator a new, renewed, or extended school administrator’s contract,” N.C. Gen. Stat. § 115C-287.1(d), if the superintendent recommends that an administrator’s contract be renewed, the Board is limited to reviewing the administrator’s personnel file as it exists at that time and the superintendent’s recommendation. In the event the Board has concerns regarding renewal that cannot be resolved by review of the administrator’s personnel file, we hold that the Board may not consider documentation outside the administrator’s personnel file or question witnesses – effectively holding a hearing – without providing (1) notice of the Board’s concerns and of the information that the Board is considering and (2) an opportunity to the administrator to respond to that information.

Here, the superintendent recommended that Ms. Tobe-Williams’ contract be renewed at the 5 June 2012 board meeting. The Board asked the superintendent to remove Ms. Tobe-Williams from the list of assistant principals he recommended for renewal because “it was aware of serious concerns” about Ms. Tobe-Williams and needed more time to “review documentation of Ms. Tobe-Williams’ performance and conduct.” The Board’s removal of Ms. Tobe-Williams from the recommendation list had the same effect as a recommendation for nonrenewal: it placed Ms. Tobe-Williams’ future employment status at risk based upon certain concerns about Ms. Tobe-Williams. Therefore, to carry out the intent of the General Assembly, the Board should have notified Ms. Tobe-Williams of her removal from the recommendation list and given

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her an opportunity to respond to any information that the Board was considering that was not included in her personnel file.²

Accordingly, we hold that the procedure employed by the Board in this case violated Ms. Tobe-Williams' procedural rights under N.C. Gen. Stat. § 115C-287.1(d) and N.C. Gen. Stat. § 115C-325(b). Those violations resulted in a record that does not include any information that Ms. Tobe-Williams might have submitted had she been given the opportunity to do so, and, to that extent, is insufficient for a determination whether the Board's non-renewal decision was "arbitrary, capricious, discriminatory, personal, or political." N.C. Gen. Stat. § 115C-287.1(d).

The trial court, however, concluded that the Board's decision was not supported by substantial evidence in the record and was arbitrary and capricious. Accordingly, it reversed the Board's decision and ordered Ms. Tobe-Williams' reinstatement. After carefully reviewing the record, we hold that, although some of the Board's specific factual findings are not supported by evidence in the record, there is substantial evidence to support the Board's ultimate findings. Those findings articulate grounds for nonrenewal that are not arbitrary, capricious, discriminatory, personal, or political. Since the record reveals that there may be a non-prohibited basis for nonrenewal, we reverse the trial court's order of reinstatement.

Nevertheless, because Ms. Tobe-Williams has not yet had an opportunity to respond to the evidence gathered and considered by the Board, we reverse the Board's decision and remand for the Board to reach a new decision after properly allowing Ms. Tobe-Williams an opportunity to be heard regarding the information that the Board intends to consider that was not included in her personnel file at the time the superintendent recommended renewal of her contract. *See Taborn v. Hammonds*, 83 N.C. App. 461, 469, 350 S.E.2d 880, 885 (1986) (vacating Board's decision and remanding for new hearing where deficiencies in Board's findings and failure to resolve material conflicts in the evidence "prevent[ed] [the Court] from discerning a substantive reason for the decision to terminate plaintiff"). Because of our resolution of this appeal, we need not address the remainder of the Board's arguments.

Affirmed in part; reversed in part; and remanded.

Judges STEPHENS and ERVIN concur.

2. We note that Ms. Tobe-Williams learned only on 12 July 2012 that material had been added to her personnel file – two days after the Board had already decided not to renew her contract. She received a copy of her personnel file on 18 July 2012, more than a week after the decision.

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[234 N.C. App. 471 (2014)]

TOMMY M. WHITESELL, PETITIONER-APPELLEE

v.

CATHY B. BARNWELL, RESPONDENT-APPELLANT

No. COA13-1426

Filed 17 June 2014

1. Partition—jointly held leasehold—contract—no estoppel

In an action involving the partition or sale of a leasehold in lake property as well as personal property, petitioner was not estopped by the agreement between the parties. Unlike *Properties, Inc. v. Cox*, 268 N.C. 14, in this case the trial court based its finding on the language of the parties' agreement (which did not contain any express stipulation as to partition) rather than the passage of time.

2. Partition—lake property leasehold—injury to a party

In an action involving the partition or sale of a leasehold in lake property as well as personal property, respondent did not show error on the question of whether petitioner would suffer injury or substantial injury. Respondent's argument consisted of questioning the evidence of injury, but the evidence showed that petitioner would suffer injury by either being unable to sell his one-half interest or having to accept a drastically reduced price to attract a buyer wishing to share a one-half interest with respondent.

3. Partition—relief sought under statute—defense of unclean hands

Respondent did not show error on the basis of unclean hands in an action for the partition or sale of a leasehold in lake property as well as personal property. She restated earlier equity arguments but presented no authority for an application of unclean hands in this case, where petitioner sought relief through statute rather than under the parties' agreement.

4. Appeal and Error—failure to cite supporting authority—failure to describe reversible error

Respondent's argument concerning essential parties in an appeal from an order that a joint leasehold in lake property and personal property be sold was dismissed where she cited no supporting authority. Furthermore, she did not describe how the alleged omission constituted reversible error.

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5. Partition—sufficiency of order of sale—governing statute

Respondent did not show error with the contention that a trial court's order for the sale of a jointly owned leasehold in lake property as well as personal property was not sufficient under the requirements of N.C. Gen. Stat. § 46-22(c). The case was governed by N.C.G.S. § 46-44 rather than N.C.G.S. § 46-22(c).

Appeal by Respondent from order entered 19 August 2013 by Judge A. Robinson Hassell in Superior Court, Rockingham County. Heard in the Court of Appeals 20 May 2014.

Rossabi Black Slaughter, P.A., by T. Keith Black and Gavin J. Reardon, for Petitioner-Appellee.

Forrester Law Firm, by Richard W. Forrester, for Respondent-Appellant.

McGEE, Judge.

Tommy M. Whitesell (“Petitioner”) and Cathy B. Barnwell (“Respondent”) each own a one-half leasehold interest in Lot No. 47 Belews Lake, Rockingham County and a one-half interest in personal property consisting of the following: a Park Model Home (“the mobile home”) on the lot and “all personal property and improvements contained” on the lot. At the time Petitioner and Respondent acquired the leasehold interest and the mobile home, they were in a dating relationship. They entered into a written agreement (the “Agreement”) around April 2000, that provided for the disposition of “the property located at Belews Lake” should either party die or should either party “desire to sell their individual ownership[.]”

Petitioner, on 29 November 2012, filed a petition for sale of the “leasing interest” and the personal property. The matter came on for hearing on 29 July 2013. In an order entered 19 August 2013, the trial court found that “a dispute exists between the Parties as to whether the Agreement contemplates both the Leasehold Interest and the Personal Property.” The trial court further found that the parties “have experienced substantial difficulty in attempting to share the Leasehold Interest and Personal Property, resulting in numerous disagreements relating to maintenance, storage of boats on off weekends and reimbursement of expenses.”

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The trial court was “not persuaded that the Agreement reflects or is sufficient evidence that the Parties intended to forever waive or abandon their respective rights to partition their Leasehold Interest in the Property or the Personal Property.” The trial court ordered a public sale of the leasehold interest and the personal property. Respondent appeals.

I. Standard of Review

It is well settled that “when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Lyons-Hart v. Hart*, 205 N.C. App. 232, 235, 695 S.E.2d 818, 821 (2010). “Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court’s conclusions of law, however, are reviewable *de novo*.” *Id.* The “‘determination as to whether a partition order and sale should [be] issue[d] is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law.’” *Id.* at 236, 695 S.E.2d at 821 (citation omitted).

II. Analysis

Respondent argues that the trial court erred in ordering a sale. Respondent makes several sub-arguments in support of this contention.

A. Estoppel

[1] First, Respondent contends Petitioner “was estopped by contract from partitioning.” For support, Respondent cites *Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E.2d 553 (1966). In *Properties*, the agreement did not contain an express stipulation that a party shall not partition the property. *Id.* at 20, 149 S.E.2d at 558. However, our Supreme Court observed that it was apparent “from the instrument itself and from the circumstances surrounding its execution that neither party considered the possibility of partition during the life of Mrs. Cox.” *Id.*

By contrast, in the present case, the trial court found that a dispute existed as to whether the agreement contemplated both the leasehold interest and the personal property. Furthermore, the trial court was “not persuaded that the Agreement reflects or is sufficient evidence that the Parties intended to forever waive or abandon their respective rights to partition their Leasehold Interest in the Property or the Personal Property.” Respondent does not challenge the above findings of fact on appeal as unsupported by competent evidence.

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Rather, Respondent contends that the trial court, “after finding that an agreement existed, surely erred in assigning its own temporal interpretation to the [A]greement.” To the extent this statement challenges the trial court’s finding of fact, Respondent nevertheless has failed to show the trial court erred. There is no indication in the trial court’s order that it based its finding on the passage of time. Rather, the trial court based its finding on the language of the Agreement, which does not contain any express stipulation as to partition. Respondent has not shown error on this basis.

B. Injury

[2] Respondent next contends Petitioner will not suffer either injury or substantial injury. To the extent this statement constitutes an argument that the trial court erred in making finding of fact 9 (“It is impossible to divide the Leasehold Interest or the Personal Property without substantial injury to at least one of the Parties.”), Respondent has failed to demonstrate that the trial court erred on this basis. “If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made[.]” N.C. Gen. Stat. § 46-44 (2013). Respondent’s argument consists of questioning the evidence of injury.

However, Petitioner testified during the hearing before the trial court that the alternating weekly schedule that the parties had been using since 2002 “doesn’t work.” He testified that the parties argued about the time frame and which duties each should perform at the property. The parties disagreed about picking up broken tree limbs, mowing the grass, the use of the septic tank, the installation of a light near the lake, cable expenses, utility expenses, fertilizer, kitchen supplies, and cleaning the property. Petitioner further testified that Respondent’s pontoon blocked his view of the lake and prevented Petitioner from keeping his boat in the slip. This evidence shows the obstacles Petitioner faces in selling his one-half interest in the leasehold, mobile home, and other personal property. Petitioner would suffer injury by either being unable to sell his one-half interest or having to accept a drastically reduced price to attract a buyer who wishes to share a one-half interest with Respondent.

The evidence shows that a “division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested[.]” N.C.G.S. § 46-44. Respondent has not shown error on this basis.

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C. Unclean Hands

[3] Respondent next contends that Petitioner has unclean hands. “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). However, within this sub-section, Respondent cites no supporting authority and restates earlier arguments relating to equity. Respondent contends that the fact Petitioner “assigned away a significant portion of the personal property” by “titling it to himself and his new wife,” is a material breach of the agreement.

Respondent does not challenge the trial court’s finding that the agreement does not show that the parties intended to waive the right to partition. Respondent has presented no authority for such application of the doctrine of unclean hands in this case, where Petitioner does not seek relief under the agreement, but rather through statute. Relief “is not to be denied because of general iniquitous conduct on the part of the complainant[.]” *Id.* at 384, 337 S.E.2d at 141. Respondent has failed to show error on this basis.

D. Essential Party

[4] Respondent also contends that Petitioner “has not named an essential party, Carolina Marina, the leasing entity for Duke Power.” However, Respondent again cites no supporting authority for this argument. *See* N.C.R. App. P. 28(b)(6) (“The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies.”). Furthermore, Respondent does not describe how this constitutes reversible error by the trial court. This argument is therefore dismissed. *See Hackos v. Goodman*, ___ N.C. App. ___, ___, 745 S.E.2d 336, 341 (2013) (“Plaintiff cites no authority in support of this conclusory statement, and fails to make any actual argument in her brief as required by N.C.R. App. P. 28(b)(6), resulting in abandonment of Plaintiff’s argument.”).

E. Findings and Conclusions

[5] Respondent next contends that the trial court’s order “is wholly inadequate to support an order for the sale of property” under the requirements of N.C. Gen. Stat. § 46-22(c). However, N.C.G.S. § 46-22(c) does not govern this case. The applicable statute is N.C. Gen. Stat. § 46-44, which provides that if “a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is

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deemed necessary, the court shall order a sale[.]” N.C.G.S. § 46-44. This Court has held that a “leasehold interest in real property is a chattel real and as such is subject to rules of law applicable to personal property.” *First Southern Savings Bank v. Tuton*, 114 N.C. App. 805, 807-08, 443 S.E.2d 345, 346 (1994); *see also Real Estate Trust v. Debnam*, 299 N.C. 510, 513, 263 S.E.2d 595, 597 (1980) (“a lease is a species of personal property”); *Moche v. Leno*, 227 N.C. 159, 160, 41 S.E.2d 369, 370 (1947) (“estates less than freehold, called ‘estate for years,’ however long, created by lease, have been classified almost invariably as personal, and not real property”); *Fleet National Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 391, 451 S.E.2d 325, 328 (1994). Respondent has therefore failed to show error on this basis.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JUNE 2014)

BANK OF AM., N.A. v. CHARLOTTE PROP. INVS., LLC No. 14-42	Mecklenburg (13CVS2168)	Affirmed
CENTURY FIRE PROT., LLC v. HEIRS No. 14-146	Catawba (12CVS1788)	Dismissed
FLORENTZ v. GORE No. 13-1223	Moore (12CVS1359)	Affirmed
FRENCH v. FRENCH No. 13-1239	Buncombe (11CVD6035)	Dismissed
IN RE C.L. No. 13-1401	Wake (12JT71)	Affirmed
IN RE D.M.H. No. 14-44	Caldwell (11JA91)	Affirmed
IN RE J.C.P. No. 13-1253	Guilford (08JT691-692) (11JT25)	Affirmed
IN RE J.R. No. 13-1473	Mecklenburg (10JA739)	Affirmed
IN RE L.J.C. No. 14-97	Wake (12JT04)	Affirmed
IN RE M.S. No. 14-138	Beaufort (11JA91)	Vacated and Remanded
IN RE N.M. No. 14-33	New Hanover (12JA222)	Affirmed
IN RE S.L.B.B. No. 14-116	Catawba (11JT177)	Affirmed
IN RE S.T.F. No. 13-1408	Robeson (10JT217-220)	Affirmed
IN RE T.L.F. No. 14-23	Wilkes (12JT88-89)	Affirmed
IN RE Z.P.S. No. 13-1378	Durham (07JT34)	Affirmed

JAMES B. TAYLOR FAM. LTD. P'SHIP v. BANK OF GRANITE No. 13-550	Caldwell (12CVS1041)	Affirmed
LARRIMORE v. DILLARD, INC. No. 13-1317	N.C. Industrial Commission (458055)	Reversed
McVICKER v. McVICKER No. 14-47	Wake (07CVD14785)	Affirmed
NEWBRIDGE BANK v. R.C. KOONTS & SONS MASONRY, INC. No. 14-13	Davidson (09CVS184)	Dismissed
PROMENADE AT SURF CITY, LLC v. NIKKIS ON TOPSAIL ISLAND, INC. No. 13-1422	Pender (12CVS231)	Affirmed
SAMMY'S AUTO SALES, INC. v. COMM'R OF DIV. OF MOTOR VEHICLES No. 13-889	Robeson (12CVS134)	Reversed
SHACKLEY v. SHACKLEY No. 13-774	Pitt (13CVD537)	Affirmed
STATE v. BALLARD No. 13-1211	Wilkes (05CRS52751-62) (05CRS52764-76) (06CRS50104-08) (06CRS50116-27) (06CRS50479)	Affirmed; Remanded for Correction of Clerical Error in Judgments.
STATE v. BARR No. 13-1461	McDowell (12CRS1514)	Vacated
STATE v. DAVEY No. 13-1177	Cleveland (12CRS2486-96) (12CRS53213-14)	No Error
STATE v. EARLE No. 13-1237	Madison (12CRS50550)	No Error
STATE v. ERVIN No. 13-1078	Gaston (11CRS56874) (11CRS58352)	Reversed and Remanded

STATE v. GLADDEN No. 13-1262	Cabarrus (04CRS12008) (04CRS13160) (04CRS8966-67) (04CRS9284) (05CRS2084)	Affirmed
STATE v. GRAVES No. 13-1174	Wake (10CRS222323-24) (12CRS5928)	No Error
STATE v. HONEYCUTT No. 13-1103	Orange (11CRS53479) (13CRS20)	No Error
STATE v. HUGHES No. 13-1400	Gaston (11CRS12184) (12CRS11164)	No Prejudicial Error in Part; Dismissed in Part.
STATE v. LEWIS No. 13-905	Rowan (10CRS58246) (11CRS3083)	No Error
STATE v. LOCKHART No. 13-1460	Guilford (12CRS80377)	No Error
STATE v. MANNS No. 13-1324	Forsyth (12CRS61995)	No Error
STATE v. McKOY No. 13-1071	Pender (11CRS52835) (12CRS542)	Vacated in Part, No Error in Part, and Remanded for Resentencing
STATE v. PHILLIPS No. 14-54	Craven (09CRS51899)	No Error
STATE v. ROSS No. 13-1162	Cleveland (09CRS53903) (09CRS53906-07)	No Error
STATE v. SMART No. 13-1231	Burke (12CRS20)	No Error
STATE v. SMITH No. 13-1036	Columbus (11CRS50365-66) (11CRS50392) (11CRS50425)	No Error In Part, Dismissed in Part, Vacated in Part

STATE v. WEST No. 13-1399	Pasquotank (10CRS1724-25) (10CRS51007)	No Error
STATE v. WARREN No. 13-1268	Haywood (11CRS53915) (12CRS50517)	Reversed and Remanded
STATE v. WOOTEN No. 13-1255	Wayne (11CRS55895)	No Error
STATE v. ZINKAND No. 14-121	Macon (11CRS50083)	No Error
TRIMARK FOODCRAFT, INC. v. LEGER No. 13-923	Cabarrus (12CVD2558)	Affirmed in part; reversed and remanded in part
WISE RECYCLING, LLC v. TOWN OF CLAYTON No. 14-4	Johnston (13CVS528)	Dismissed

CINOMAN v. UNIV. OF N.C.

[234 N.C. App. 481 (2014)]

MICHAEL I. CINOMAN, M.D., AND MEDICAL MUTUAL INSURANCE COMPANY OF
NORTH CAROLINA, PLAINTIFFS

v.

THE UNIVERSITY OF NORTH CAROLINA; THE UNIVERSITY OF NORTH CAROLINA
HEALTHCARE SYSTEM, D/B/A THE UNIVERSITY OF NORTH CAROLINA HOSPITALS
AT CHAPEL HILL; THE UNIVERSITY OF NORTH CAROLINA, D/B/A THE SCHOOL
OF MEDICINE OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; THE
UNIVERSITY OF NORTH CAROLINA, D/B/A THE UNIVERSITY OF NORTH CAROLINA
LIABILITY INSURANCE TRUST FUND; WILLIAM L. ROPER, IN HIS CAPACITY AS
DEAN OF THE SCHOOL OF MEDICINE OF THE UNIVERSITY OF NORTH CAROLINA
AT CHAPEL HILL; BRIAN GOLDSTEIN IN HIS CAPACITY AS CHAIRMAN OF THE
UNIVERSITY OF NORTH CAROLINA LIABILITY INSURANCE TRUST FUND COUNCIL;
THOMAS M. STERN, AS GUARDIAN AD LITEM FOR ARMANI WAKEFALL;
AND WAKEMED, DEFENDANTS

No. COA13-902-2

Filed 1 July 2014

1. Appeal and Error—interlocutory orders and appeals—stay of declaratory judgment action—immediately appealable

A trial court's interlocutory order granting a stay of a declaratory judgment action concerning an insurer's duty to defend was immediately appealable. Whether an insurer has a duty to defend an underlying action affects a substantial right that might be lost absent immediate appeal. This opinion supersedes the previous opinion filed 4 March 2014.

2. Declaratory Judgments—determination of insurance coverage—actual case or controversy

The trial court erred by staying a declaratory judgment action based on its determination that no actual controversy existed as to the duty of the University of North Carolina Liability Insurance Trust Fund (UNC LITF) to indemnify until the underlying malpractice action was finally resolved. While the UNC-LITF policy by its terms is primary, the policy is also pro rata, so that UNC-LITF and the doctor's private insurance provider (MMIC) would provide concurrent coverage if the MMIC policy is pro rata, and UNC-LITF would be primary if the MMIC policy contains an excess clause. Therefore, an actual controversy exists as to the UNC LITF's duty to indemnify. This opinion supersedes the previous opinion filed 4 March 2014.

Appeal by plaintiffs from order entered 19 April 2013 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 6 January 2014 and opinion filed 4 March 2014. Petition for Rehearing allowed 17 April 2014.

CINOMAN v. UNIV. OF N.C.

[234 N.C. App. 481 (2014)]

Manning, Fulton & Skinner, P.A., by Michael T. Medford and J. Whitfield Gibson, for plaintiffs-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by David N. Allen, J. Douglas Grimes, and M. Duane Jones, for the University of North Carolina defendants-appellees.

Tin, Fulton, Walker & Owen, by William Simpson, and Ferguson, Chambers & Sumter, P.A., by James E. Ferguson II, for defendant-appellee Thomas M. Stern, as Guardian ad Litem for Armani Wakefall.

MARTIN, Chief Judge.

Plaintiffs Michael I. Cinoman, M.D. and Medical Mutual Insurance Company of North Carolina (“MMIC”) appeal from an order granting UNC defendants’¹ motion to stay this declaratory action pending a final resolution of the underlying malpractice action. On 4 March 2014, this Court filed an opinion reversing the stay order. UNC defendants filed a Petition for Rehearing on 8 April 2014, which we allowed on 17 April 2014. Upon reconsideration, we reach the same disposition but modify the originally filed opinion. This opinion supersedes the previous opinion filed 4 March 2014.

In February 1999, Dr. Cinoman served as a temporary attending physician for full-time rotations in the University of North Carolina Hospitals at Chapel Hill Pediatric Intensive Care Unit (“UNC-PICU”) as part of an agreement to assist UNC defendants with a staffing shortage in the UNC-PICU. On 21 June 2007, Thomas M. Stern, as guardian ad litem for Armani Wakefall, initiated a medical malpractice action against Dr. Cinoman and others for damages allegedly incurred by Wakefall as a result of negligent treatment she received at the UNC-PICU in February 1999 (“underlying malpractice action”).

Dr. Cinoman is insured under a professional liability insurance policy issued by MMIC, which has treated its coverage as broad enough to cover the claims asserted against Dr. Cinoman in the underlying malpractice action. UNC defendants maintained that Dr. Cinoman is not entitled to coverage under the University of North Carolina Liability Insurance

1. UNC defendants are all defendants except for Thomas M. Stern, who is a nominal defendant due to his interest in the insurance coverage, and WakeMed, which is not a party to this appeal.

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Trust Fund (“UNC LITF”), which provides coverage for claims against employees and agents of UNC defendants, because he was not a full-time employee of UNC defendants at the time of the events giving rise to the underlying malpractice action. In the absence of coverage by the UNC LITF, the damages demanded in the underlying malpractice action allegedly exceed Dr. Cinoman’s professional liability insurance coverage.

On 17 February 2009, plaintiffs filed this declaratory judgment action to determine whether Dr. Cinoman is entitled to coverage under the UNC LITF, in addition to his coverage under the MMIC policy, and the relative liabilities of MMIC and the UNC LITF. Plaintiffs and UNC defendants moved for summary judgment, and the trial court granted summary judgment in favor of UNC defendants on 15 April 2010. On appeal, this Court reversed the summary judgment order, concluding that there were questions of material fact that rendered summary judgment for either party inappropriate, and remanded the case for trial. *Cinoman v. Univ. of N.C.*, 216 N.C. App. 585, 718 S.E.2d 424 (2011) (unpublished), *disc. review denied*, 365 N.C. 573, 724 S.E.2d 527 (2012).

On 28 February 2013, UNC defendants moved to stay further proceedings in this action pending the final resolution of the underlying malpractice action. In an order entered 19 April 2013, the trial court granted the motion to stay, finding that while an actual controversy exists as to the UNC LITF’s duty to defend, no such controversy exists as to the UNC LITF’s duty to indemnify until the underlying malpractice action is finally resolved. Plaintiffs appeal from the order pursuant to N.C.G.S. §§ 1-277 and 7A-27. UNC defendants moved to dismiss the appeal as interlocutory.

[1] We must first determine whether the trial court’s interlocutory order granting the stay is immediately appealable. Although interlocutory orders are not generally appealable, immediate appeal is available under N.C.G.S. §§ 1-277 and 7A-27 from an interlocutory order which affects a substantial right. *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 578–79 (1999), *on remand*, 137 N.C. App. 82, 527 S.E.2d 75 (2000). Where there is a pending suit or claim, an interlocutory order concerning the issue of whether an insurer has a duty to defend in the underlying action “affects a substantial right that might be lost absent immediate appeal.” *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000). We therefore conclude that the appeal is properly before us.

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A survey of the relevant case law indicates that our review on appeal of an order granting a stay is an abuse of discretion standard. See *Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960) (“Whether one lawsuit will be held in abeyance to abide the outcome of another rests in the sound discretion of the trial judge, and his action will not be disturbed on appeal, unless the discretion has been abused”); see also *Lawyers Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) (concluding that order staying declaratory judgment action to permit trial of parallel action in another state is reviewed for abuse of discretion and declining to adopt a *de novo* standard of review); *Home Indem. Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325, 393 S.E.2d 118, 120 (holding that order staying litigation pending final disposition of similar action in federal court “is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion”), *appeal dismissed and disc. review denied*, 327 N.C. 428, 396 S.E.2d 611 (1990). “A [trial] court by definition abuses its discretion when it makes an error of law.” *In re A.F.*, ___ N.C. App. ___, ___, 752 S.E.2d 245, 248 (2013) (alteration in original) (quoting *Koon v. United States*, 518 U.S. 81, 100, 135 L. Ed. 2d 392, 414 (1996)).

[2] On appeal, plaintiffs contend the trial court erred by granting the stay based on its determination that no actual controversy exists as to the UNC LITF’s duty to indemnify until the underlying malpractice action is finally resolved. We agree.

“An actual controversy between adverse parties is a jurisdictional prerequisite for a declaratory judgment.” *Newton v. Ohio Cas. Ins. Co.*, 91 N.C. App. 421, 422, 371 S.E.2d 782, 783 (1988). An actual controversy exists where an insurer seeks a determination that primary coverage is not provided under its policy and is instead provided under policies issued by other insurers. See *Gov’t Emps. Ins. Co. v. New S. Ins. Co.*, 119 N.C. App. 700, 704, 459 S.E.2d 817, 819, *disc. review denied*, 341 N.C. 648, 462 S.E.2d 510 (1995). No such controversy exists, however, in a declaratory judgment action to determine whether coverage is provided under an excess insurance policy where the underlying liability action has not yet been resolved. See *N.C. Farm Bureau Mut. Ins. Co. v. Warren*, 89 N.C. App. 148, 150, 365 S.E.2d 216, 217–18, *disc. review denied*, 322 N.C. 481, 370 S.E.2d 226 (1988), *appeal after remand*, 94 N.C. App. 591, 380 S.E.2d 790 (1989).

When more than one insurance policy affords coverage for a loss, the “other insurance” clauses in the competing policies must be examined to determine which policy provides primary coverage and which

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policy provides excess coverage. *Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 328, 524 S.E.2d 386, 391, *aff'd in part and disc. review improvidently allowed in part*, 353 N.C. 240, 539 S.E.2d 274 (2000). An excess clause is a type of “other insurance” clause which “generally provides that if other valid and collectible insurance covers the occurrence in question, the ‘excess’ policy will provide coverage only for liability above the maximum coverage of the primary policy or policies.” *Horace Mann Ins. Co. v. Cont'l Cas. Co.*, 54 N.C. App. 551, 555, 284 S.E.2d 211, 213 (1981) (internal quotation marks omitted). An excess clause is distinguishable from a pro rata “other insurance” clause. *See Fid. & Cas. Co. of N.Y. v. N.C. Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 203–04, 192 S.E.2d 113, 120–21 (“The terms ‘prorate’ and ‘excess’ do not have, and were not meant by the insurers to have identical meanings.”), *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972). In *Fidelity & Casualty Co.*, this Court differentiated a pro rata clause in one policy from an excess clause in another policy:

The Farm Bureau policy provides that if the injury or damage is covered by other applicable and collectible insurance, then Farm Bureau shall not be liable for a greater proportion of the loss than its limit of liability bears to the total applicable limits of liability of all valid and collectible insurance. The F and C policy, however, provides that its insurance coverage shall be excess to any other valid and collectible insurance with respect to loss arising out of the use of any non-owned automobile. The Farm Bureau provision is known as a “pro rata” clause; the F and C provision, an “excess” clause.

Id. at 203, 192 S.E.2d at 120–21.

Where a pro rata clause in one policy competes with an excess clause in another policy, the policy with the pro rata clause provides primary coverage, and the policy with the excess clause provides secondary coverage which will only be triggered if the limits of the policy containing the pro rata clause are first exhausted. *See id.* at 204, 192 S.E.2d at 121. Furthermore, where a pro rata clause in one policy competes with a pro rata clause in another policy, each insurer has primary concurrent liability for a proportionate amount of the loss. *See* 44A Am. Jur. 2d *Insurance* § 1752 (2013). Accordingly, an actual controversy exists in a declaratory judgment action to determine the liability of an insurer under its policy where the policy contains a pro rata clause and the other applicable policy contains either an excess clause or a pro rata clause.

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In general, there is no primary versus excess insurance policy relationship where a self-insurance program is at issue because self-insurance does not constitute other collectible insurance within the meaning of an insurance policy's "other insurance" clause. *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 688–89, 443 S.E.2d 357, 360–61 (1994), *disc. review improvidently allowed per curiam*, 340 N.C. 353, 457 S.E.2d 300 (1995). Self-insurance is equivalent to a primary insurance policy, however, "when the self-insurance expressly provides that it is primary to other insurance." *Id.* at 689, 443 S.E.2d at 361. That is, while self-insurance generally is not a primary insurance policy, an exception exists where the self-insurance states that it affords primary coverage. *Cf. id.* (concluding that insured's self-insurance was not the primary insurance policy where there was no evidence that the self-insurance stated it would be primary to the insured's other insurance).

In their Petition, UNC defendants rely on *Cone Mills Corp.* for the contention that the UNC LITF is self-insurance and thus cannot be deemed a primary insurance policy. We note that this is the first time that UNC defendants have claimed that the UNC LITF is self-insurance. On appeal, UNC defendants made no assertion that the UNC LITF is self-insurance and failed to cite to a single case in which self-insurance was at issue; rather, UNC defendants likened the UNC LITF to an excess insurance policy and relied on cases finding no actual controversy exists in a declaratory judgment action to determine coverage provided by an excess insurance policy.

The UNC LITF is a self-insurance program for professional liability, authorized by N.C.G.S. § 116-219. However, the UNC LITF, by its terms set forth in the UNC LITF Memorandum of Coverage, falls under the exception carved out in *Cone Mills Corp.* and affords primary coverage. We find the plain language of the following "other insurance" clause in the UNC LITF Memorandum of Coverage to be controlling:

ARTICLE VII. OTHER INSURANCE

When this agreement and other collectible insurance both apply to a loss on the same basis, whether primary, excess or contingent, the Trust Fund shall not be liable under this agreement for a greater proportion of the loss than that stated in the applicable contribution provision below:

A. Contribution by Equal Shares. If all such other valid and collectible insurance provides for contribution by equal shares, the Trust Fund shall not be liable for a

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greater proportion of such loss than would be payable if each insurance company contributes an equal share until the share of each company equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid. With respect to any amount of loss not so paid, the remaining companies shall continue to contribute equal shares of the remaining amount of the loss until each such company has paid its limit in full or the full amount of the loss is paid.

B. Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, the Trust Fund shall not be liable for a greater proportion of such loss than the applicable limit of liability under this agreement for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

Nothing in this provision indicates that the UNC LITF's liability arises only after the limits of other collectible insurance policies have been exhausted. Rather, the provision provides that the UNC LITF shares liability with other collectible insurance according to their respective limits. Thus, the UNC LITF "other insurance" clause is a pro rata clause. *See Fid. & Cas. Co.*, 16 N.C. App. at 203–04, 192 S.E.2d at 120–21.

While the UNC LITF "other insurance" clause does not expressly provide that the UNC LITF is primary to other insurance, the pro rata clause nonetheless means that the UNC LITF provides primary coverage regardless of the terms of the MMIC policy.² Assuming, *arguendo*, that the MMIC policy contains an excess clause, then the UNC LITF provides primary coverage. *See id.* at 204, 192 S.E.2d at 121. If, on the other hand, the MMIC policy contains a pro rata clause, then the UNC LITF and MMIC share liability on a pro rata basis according to their respective limits and, for that reason, both the UNC LITF and MMIC provide primary concurrent coverage. *See* 44A Am. Jur. 2d *Insurance* § 1752. Therefore, because the UNC LITF affords primary coverage, an actual controversy exists as to the UNC LITF's duty to indemnify, and the trial court erred by granting the stay based on its determination that no such controversy exists pending a final resolution in the underlying malpractice action.

2. Although the MMIC policy is not included in the record on appeal, a review of the policy is not necessary because the UNC LITF "other insurance" clause is a pro rata clause. That is, regardless of whether the MMIC policy contains an excess clause or a pro rata clause, the UNC LITF provides primary coverage.

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The remaining arguments in UNC defendants' Petition are without merit and we decline to consider them further.

Reversed.

Judges ERVIN and McCULLOUGH concur.

JIMMY HILL, EMPLOYEE, PLAINTIFF
v.
FEDERAL EXPRESS CORPORATION, EMPLOYER, SELF-INSURED
(SEDWICK CMS, THIRD PARTY ADMINISTRATOR), DEFENDANT

No. COA 14-60

Filed 1 July 2014

1. Worker's Compensation—no interruption of work routine—findings

The evidence in a worker's compensation case supported the Industrial Commission's findings, which supported its conclusion that a Federal Express driver who suffered a carotid dissection while delivering packages on December 23 did not experience an interruption of his work routine. The challenged portions of the Commission's findings were supported by competent evidence, plaintiff failed to articulate the legal or medical significance of the circumstances he posited as unusual, and the full Commission reviews appeals from the deputy commissioner de novo.

2. Worker's Compensation—no injury by accident—findings—standard of decision—Commission's discretion

The findings of the Industrial Commission in a worker's compensation case were supported by competent evidence and supported the Commission's conclusion that plaintiff did not sustain an injury by accident where a Federal Express driver suffered a stroke while delivering packages on December 23. Plaintiff appeared to argue, without citation to authority, that when the Industrial Commission resolves contradictions in the evidence or issues of credibility, it must employ the standard applicable to appellate review, and that the Commission erred when it failed to take plaintiff's affidavit in the light most favorable to plaintiff. However, the Commission may accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted.

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Appeal by plaintiff from the Opinion and Award entered 30 August 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 May 2014.

Oxner Thomas & Permar, by Justin B. Wraight, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Brooke M. Lewis, and M. Duane Jones, for defendant-appellee.

STEELMAN, Judge.

The Commission's findings of fact were supported by competent evidence and its findings supported its conclusions of law. The Commission did not abuse its discretion in its determinations of the weight and credibility of the evidence, and did not employ an overly narrow interpretation of the Workers Compensation Act in weighing the evidence.

I. Factual and Procedural History

Jimmy Hill (plaintiff) was born in 1953 and was 59 at the time of the hearing in this case. In December 2011 plaintiff had been employed as a courier for Federal Express Corporation (defendant) for over 13 years. His duties included loading and delivering packages. As a courier, plaintiff was required to lift 75 pound packages and delivered 80 to 90 packages a day. On 23 December 2011 plaintiff arrived at work shortly before 8:00 a.m. Upon arrival at work, plaintiff checked the lights and brakes in his truck, performed stretching exercises, and began sorting and arranging the packages in his truck.

On a normal day, couriers were required to deliver packages in order of priority, based on factors such as the need to deliver refrigerated medications in a timely manner or the fact that a customer had paid for express delivery. To accomplish this, plaintiff might drive past some delivery locations, and return to them after he completed the priority deliveries. On 23 December 2011, two factors led defendant to abandon its usual prioritizing. First, because it was the last business day before Christmas, plaintiff had so many deliveries that he had to place packages on the floor of his truck. Secondly, a plane bringing packages for delivery was delayed, so that instead of leaving the warehouse at 8:15, plaintiff did not leave until about 9:00 a.m. Plaintiff's supervisor agreed that plaintiff should deliver packages on the floor as soon as possible, and that he could use a "straight line" delivery route, stopping at

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each delivery location as he came to it, even if this resulted in delayed delivery of packages to customers who had contracted for early morning delivery.

Between 9:00 and 11:00 a.m., plaintiff delivered about 20 packages. Shortly after 11:00 a.m., plaintiff began experiencing impaired vision and significant difficulties with motor control. He was able to park at a nearby fire station, and was taken by ambulance to Moses Cone Hospital. Plaintiff was diagnosed with a stroke cause by a carotid dissection, which is a tear in a blood vessel. Plaintiff was treated in the hospital for about five days, followed by a period of rehabilitative therapy. Plaintiff made a good recovery, but as of the time of the hearing he was still experiencing cognitive and physical effects of the stroke, and had not been able to return to work.

Plaintiff filed a claim for workers compensation benefits, which defendant denied on the grounds that plaintiff had experienced “no work related accident resulting in injury.” The Full Commission issued its Opinion and Award on 30 August 2013, denying plaintiff’s claim for workers compensation benefits. The Commission concluded that “plaintiff’s job duties as a courier for FedEx on December 23, 2011 were not a significant factor in his development of a carotid dissection and did not cause the carotid dissection that led to his stroke.”

Plaintiff appeals.

II. Standard of Review

Appellate review of an Industrial Commission order is “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). The Commission has sole responsibility for evaluating the weight and credibility to be given to the record evidence. *Id.* (citation omitted). Findings that are not challenged on appeal are “presumed to be supported by competent evidence” and are “conclusively established on appeal.” *Johnson v. Herbie’s Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). The “Commission’s conclusions of law are reviewed *de novo*.” *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

The “claimant in a workers’ compensation case bears the burden of initially proving ‘each and every element of compensability’ . . . by a ‘greater weight’ of the evidence or a ‘preponderance’ of the evidence.” *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (2005)

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(quoting *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003), and *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995)). “To establish ‘compensability’ . . . a ‘claimant must prove three elements: (1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment.’” *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (quoting *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). In this case the parties disagree about whether plaintiff presented evidence that (1) his employment bore a causal relationship to his carotid dissection, and (2) whether on 23 December 2011 there was an interruption of plaintiff’s normal work routine and the introduction of unexpected or unusual circumstances such that the Commission might find that he suffered an injury by “accident.”

“Our Supreme Court has defined the term ‘accident’ as used in the Workers’ Compensation Act as ‘an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.’ The elements of an ‘accident’ are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. Of course, if the employee is performing his regular duties in the ‘usual and customary manner,’ and is injured, there is no ‘accident’ and the injury is not compensable.” *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E. 2d 360, 363 (1980) (quoting *Hensley v. Cooperative*, 246 N.C. 274, 278, 98 S.E. 2d 289, 292 (1957), and citing *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963), and *O’Mary v. Clearing Corp.*, 261 N.C. 508, 135 S.E. 2d 193 (1964)).

In *Gunter v. Dayco Corp.*, 317 N.C. 670, 346 S.E.2d 395 (1986), our Supreme Court upheld a workers’ compensation award where the claimant injured his arm while performing “twisting movements” shortly after starting a new job requiring these unaccustomed movements. Similarly, in *Salomon v. Oaks of Carolina*, 217 N.C. App. 146, 718 S.E.2d 204 (2011), we upheld the Commission’s determination that a nursing assistant suffered an injury by accident where her injury was caused by a patient’s unusual and unexpected resistance to the plaintiff’s care. However, an injury is not the result of an “accident” simply because it occurs during a challenging workday in which the claimant performs his or her usual duties under more difficult conditions. *See, e.g., Southards v. Motor Lines*, 11 N.C. App. 583, 585, 181 S.E.2d 811, 813 (1971) (holding the Commission’s findings insufficient to support award, given that the “fact that plaintiff was handling a different commodity than usual, without more, and that the weather was hot, are not enough to satisfy the

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requirement of an ‘interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences[.]’ . . . Nor is the mere fact that plaintiff was in a hurry[.]” (citing *Gray v. Storage, Inc.*, 10 N.C. App. 668, 179 S.E.2d 883 (1971)).

III. Commission’s Findings of Fact

[1] Plaintiff’s first argument challenges the evidentiary support for the Commission’s findings concerning whether the circumstances of plaintiff’s employment on 23 December 2011 constituted “an unlooked for and untoward event” or “interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.” *Shay v. Rowan Salisbury Sch.*, 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (2010) (citation omitted). Plaintiff argues that the Commission erred in making findings on this issue that were not supported by competent evidence. We disagree.

The Commission’s findings about the circumstances of plaintiff’s job on 23 December 2011 included the following:

1. As of the date of the hearing before the Deputy Commissioner, plaintiff was 59 years old and had been employed by defendant for 14 years as a courier[.] . . .

2. As a courier, plaintiff was required to load his truck, deliver packages, and pick up packages. Plaintiff typically handled small and large packages of varying weights. He testified that he lifted packages weighing between 75 and 150 pounds, and it was not unusual for plaintiff to deliver 85 to 90 packages a day.

. . .

4. In December 2011, plaintiff was driving a sprinter truck. . . [He] was familiar with the operation of the truck[.] . . .

5. Plaintiff had worked as a courier for defendant during the Christmas season for many years, and he testified that the Christmas season is always a busy time for FedEx couriers. Plaintiff had not driven the particular route he was driving on December 23, 2011 during prior Christmas seasons; however, he had been driving this particular route since his old route had been switched over to the new FedEx hub. The only difference between the two routes that plaintiff was able to identify at the hearing before the Deputy Commissioner was that the route he was assigned

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sometime after Christmas 2010 was more residential than his prior route.

6. On a 'regular' day, defendant operates on a priority schedule, such that priority overnight packages have to be delivered by 10:30 a.m. . . . Because of the priority package delivery times, couriers would load their trucks and drive their route so that the priority packages could be delivered first and on time. This meant that a courier might drive past a stop that the courier would come back to later in the day. . . . [During the winter] the couriers typically rush to complete their deliveries . . . before it gets dark and becomes difficult to see the house numbers.

7. As a courier, plaintiff would generally . . . start his route at approximately 8:00 or 8:10 am. However, if the plane bringing incoming freight was delayed, plaintiff would be delayed in starting his route.

8. It was not unusual for planes to be delayed. To address this contingency, defendant had implemented protocols to address the delivery of packages, such as foregoing priority delivery and going to a 'straight line' delivery method, which involves the couriers making each stop on their route, rather than bypassing some stops in the route in order to go on to the next priority delivery. . . .

9. On December 23, 2011, the plane bringing in the freight that had to be delivered that day was late to arrive. Plaintiff testified that this allowed him to spend some time lining up the freight that was already in his truck, and to swap off routes with other drivers. . . . When asked by his attorney whether a late plane put any pressure on him, plaintiff testified that it just means you will be in a different traffic pattern when you eventually start your route. Plaintiff testified that he left the hub at "9:00 something" on [that] morning[.] . . .

10. Plaintiff testified that on December 23, 2011, he had large packages on his truck; however, he did not testify as to whether those packages were any larger than the packages he regularly had to deliver. Plaintiff also testified that he did not know how many packages he had on his truck when he left the hub on December 23, 2011, but that this day was different because of "the amount of packages that

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was there and the size and awkwardness of it[.]” . . . [That day] was the first time that he ever had to deliver a flat screen TV, but there was no testimony that the flat screen TV weighed any more than other packages he had delivered over the past 13 years. Finally, he testified that the floor of his truck was filled with packages and that he had to step over packages when he made his deliveries.

Based on its findings concerning the circumstances of plaintiff’s work on 23 December 2011, the Commission stated in Finding No. 21 that:

21. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that plaintiff did not suffer an interruption of his regular work routine on December 23, 2011. Plaintiff’s job by its very nature requires that he rush to make timely deliveries. Plaintiff was very busy every Christmas season. The evidence of record does not support a finding that plaintiff was busier on December 23, 2011 than he had been at other times during the 2011 Christmas season or during past Christmas seasons. The evidence does not support a finding that the late arrival of the plane caused him to rush any more than usual. In fact, plaintiff had more time to organize his truck, and he did not have to complete the priority deliveries by 10:30. While his truck may have been very full, there is no evidence that having to step over packages on the floor or move awkwardly in the truck was not something he had had to do during past Christmas seasons.

We hold that the Commission’s findings are supported by competent evidence. In arguing for a contrary result, plaintiff challenges only a few excerpts from Findings of Fact 5,8, 9, and 21 which he contends were not supported by competent evidence. The remaining findings, which as discussed above are conclusively established given that they are not challenged, are sufficient to support the Commission’s conclusion that plaintiff was not subjected to any significant interruption of his work routine. Furthermore, our review reveals that the challenged excerpts are supported by competent evidence.

Plaintiff first contends that the Commission erred in Finding No. 8 by finding that it was not unusual for planes to be late, and argues that the “record is devoid of any evidence that supports this finding.” Plaintiff testified that defendant identified the situation of a delayed plane as a “code 43” and that specific procedures were in place for the couriers to

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follow in response to delays. The Commission could reasonably find that the existence of a specific identification code and an alternative plan for use when planes were delayed was evidence that this occurrence was not unusual. This argument lacks merit.

Plaintiff also argues that the Commission erred in Finding of Fact 5 by finding that the only difference plaintiff identified between his former delivery route and the route he was assigned in 2011 was that the newer route was more residential. Plaintiff asserts that this finding “is quite contrary to the testimony in this matter and is not supported by competent evidence.” However, plaintiff does not dispute that he testified that the newer route was more residential, and does not identify any other differences between the two delivery routes. Instead, he argues that other aspects of plaintiff’s work day on 23 December 2011 were unusual. The Commission did not err by finding that the only difference plaintiff noted between his 2011 route and his route prior to Christmas 2010 was that the new route was more residential.¹

In addition, plaintiff argues that the Commission erred in Finding of Fact 9, by finding that the plane’s delay allowed plaintiff additional time to arrange the freight in his truck, or to trade routes or deliveries with other drivers. Plaintiff asserts that this finding “is completely contradicted by the testimony.” However, when plaintiff was asked to discuss the effect of a late plane on his work day, he testified that:

We had a 43 at 8:05 I’m thinking. It’s on my timecard. A 43 is a delay for planes and really it - I mean, you don’t want a late plane but really that gave us time to line up what we had already there [in the truck.] And then the couriers will swap off on the routes that’s close to you, you know. “Can you hit this on your way down to so-and-so because this the only one I’ve got in that area?” And we swapped off, you know during that time and all, [and] finished loading our trucks[.]”

(emphasis added). This finding was clearly supported, rather than “completely contradicted” by the above-quoted testimony.

Plaintiff also asserts that Finding No. 21 “demonstrates multiple examples of conclusions which are not supported by competent evidence.” Plaintiff challenges the finding that “the evidence does not

1. We also note that plaintiff failed to offer evidence concerning the significance, if any, of the residential character of the new route. For example, he did not testify that it was harder to service a residential delivery route, or that it took longer.

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support a finding that the late arrival of the plane caused [plaintiff] to rush any more than usual,” and asserts that plaintiff “unequivocally testified that late planes wreak havoc on [his] normal job[.]” Plaintiff testified that the delay gave him additional time to organize his route and trade deliveries with other couriers. Also, in response to the delay, defendant adjusted some of its normal policies; for example, couriers were permitted to deliver packages in a straight line, even if that meant that overnight deliveries were delayed. On the other hand, the late start gave plaintiff less time to complete the route before dark. Plaintiff was never asked whether overall his job was easier or harder when a plane was delayed, and he certainly never testified “unequivocally” that the situation “wreaked havoc” on his delivery schedule. In addition, plaintiff testified that he delivered 80 or 90 packages a day. He experienced stroke symptoms after working only two hours and delivering about 20 packages, a rate of delivery that was no faster than usual. We hold that the challenged portions of the Commission’s findings were supported by competent evidence.

Plaintiff also cites findings of fact made by the Deputy Commissioner and asserts that they illustrate “the abnormalities and unusual circumstances which Plaintiff faced on the day of his injury.” However, “[w]hether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission - not the hearing officer.” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). “[T]he Full Commission reviews appeals from the Deputy Commissioner *de novo*. Therefore, the Deputy Commissioner’s findings are irrelevant and have no bearing on the instant case.” *Newnam v. New Hanover Regional Med. Ctr.*, __ N.C. App. __, __, 711 S.E.2d 194, 200 (2011) (citing *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976)).

Plaintiff has also failed to articulate the legal or medical significance of the circumstances he posits as unusual. He offers no reasons why a delayed plane, busy time of year, or packages on the truck’s floor might have resulted in his injury. We hold that the Commission’s findings of fact were supported by competent evidence, and that they supported its conclusion that on 23 December 2011 plaintiff did not experience an interruption of his work routine. Plaintiff’s arguments to the contrary lack merit.

IV. Commission’s Determinations on Weight and Credibility

[2] Plaintiff’s next argument challenges the Commission’s findings concerning whether the medical evidence showed a causal relationship between his employment and his injury. This argument lacks merit.

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The Commission concluded that the greater weight of the evidence showed that his job duties on 23 December 2011 “were not a significant factor in his development of a carotid dissection and did not cause the carotid dissection that led to his stroke.” This conclusion was supported by its findings, including the following:

. . .

11. At approximately 11:00 a.m. on December 23, 2011, after plaintiff had made 20 deliveries, he began to experience blurred and distorted vision[, and] . . . difficulty with his fine motor skills[.] . . . [He] drove to a nearby fire station[, where a fireman] . . . called an ambulance to transport him to the hospital.

12. Plaintiff was then transported to the Moses Cone Hospital Emergency Department where he was examined by Dr. Pramod P. Sethi[.] . . . [P]laintiff had a major occlusion of the internal carotid artery of the neck. . . . [Dr. Deveshwar] performed an emergency catheter angiogram [which] . . . revealed a carotid dissection[,] . . . [and] used a balloon and a stent to open the dissected area and administered clot-busting medicine[.] . . .

13. . . . [Plaintiff] sustained a . . . stroke, secondary to . . . a left internal carotid artery occlusion from a left internal carotid artery dissection. Plaintiff remained in the hospital until December 28, 2011. As of the date of his discharge, plaintiff continued to experience problems with his speech and motor movement on his right side. He was prescribed medication and referred to rehabilitation therapy[.] . . .

14. A carotid dissection occurs when a rupture or tear develops in the inner layer of the carotid artery, causing blood to seep between the layers of the artery to cause an occlusion, which if left undetected causes a clot to develop, which in turn causes a stroke. No one knows how long it takes between the time the artery dissects and the time the patient begins to show symptoms of a stroke, but it is a multi-stage process which Dr. Coin believes could possibly take a few days to a week. Dr. Coin, a neurologist who reviewed plaintiff’s medical records and testified as an expert at defendant’s request, testified that it would be difficult for him to understand how it could all happen within three hours[.] . . . Dr. Daniel Gentry, plaintiff’s

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family doctor, testified that a dissection “comes from a defect plus time.”

15. Dr. Sethi testified that several things can cause a carotid dissection, including “minimal postural trauma” . . . or a hereditary condition[.] . . . People who suffer from cardiovascular disease . . . are predisposed to suffer a carotid dissection. Advanced age (i.e., over 50) . . . [is another] risk factor[] for developing a carotid dissection.

16. With regard to trauma specifically, Dr. Sethi testified that any minor trauma can cause a dissection, but minor trauma will not cause a dissection in everyone. . . . Dr. Sethi went on to explain that most acute traumatic events have a sudden and unexpected character, such as a quick blow to the neck or an abrupt turning of the head with lateral flexion of the neck. Dr. Coin testified that a dissection could be caused by obvious external trauma, such as a motor vehicle accident, or some trivial “trauma” such as coughing, wrenching your neck or even simply turning the head from one side to the other. Dr. Gentry was of the opinion that no one can really “put their finger on” what causes a dissection in any given case, and that it would be impossible to say that an abrupt turning of the head caused a dissection. According to Dr. Gentry, there is no scientific or medical evidence that activity such as . . . lifting packages in a truck could cause a dissection. He also disagreed with . . . [the] suggestion that you would expect a dissection to come from some sort of unusual exertion.

. . .

18. Prior to the hearing before the Deputy Commissioner, plaintiff’s counsel sent Dr. Sethi a letter setting forth questions regarding the cause of plaintiff’s carotid dissection. The letter to Dr. Sethi included an affidavit signed by plaintiff which set forth several ways in which Plaintiff contends that his workday on December 23, 2011 was unusual. After reviewing the affidavit in which plaintiff stated that December 23, 2011 was an usually busy day during which he was rushing to make deliveries of unusually heavy packages of unusual shape in the time allotted, during which he had to contort his body into awkward positions, Dr. Sethi stated on the questionnaire that (1) plaintiff’s job duties and responsibilities as a courier

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more likely than not [were] a significant factor in his suffering a left internal carotid artery occlusion resulting from dissection on December 23, 2011; and (2) plaintiff's left internal carotid artery dissection on December 23, 2011 was more likely than not caused by a traumatic event, such as an abrupt turning of the head with lateral flexion of the neck, when he was maneuvering himself in a crowded delivery truck and lifting heavy packages. However, when asked on cross-examination about his answers on the questionnaire, Dr. Sethi testified: "I didn't say it caused. I said it could have contributed. It's possible that it played a role." With regard to his response to the question about an abrupt turning of the head, Dr. Sethi stated on cross-examination that "there's no possible answer here. I think it's possible it could have been caused by that."

19. While plaintiff did testify at the hearing that he had to move awkwardly in the back of the truck on December 23, 2011 due to the number of packages on the floor and the location of the shelves, there is no evidence of record that, at any point, plaintiff had to abruptly turn his head.

20. Dr. Coin testified that he considered Plaintiff's job duties to be a "trivial trauma in the same category of probably . . . numerous things that could have happened in the week prior to his stroke and that you could not with a degree of certainty identify that as a significant factor for his dissection." Dr. Coin also testified that plaintiff's job duties did not place him at an increased risk of suffering a dissection. In this regard, Dr. Sethi testified that all FedEx drivers are not at an increased risk of having a dissection.

21. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that plaintiff did not suffer an interruption of his regular work routine on December 23, 2011. . . . Moreover, there is no evidence that anything happened at any point to cause plaintiff to have to abruptly turn his head. At the time plaintiff experienced the onset of his stroke symptoms, he had only delivered 20 packages, when he was accustomed to delivering 85 to 90 packages a day.

22. The Full Commission places greater weight on the testimony of Dr. Coin and Dr. Gentry with regard to the

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issue of whether anything Plaintiff did on December 23, 2011 caused his carotid dissection and subsequent stroke. Based upon a preponderance of the competent, credible evidence of record, the Full Commission finds that plaintiff's job duties as a courier for FedEx on December 23, 2011 were not a significant factor in his development of a carotid dissection and did not cause the carotid dissection that led to his stroke.

These findings are supported by competent evidence and support the Commission's conclusion that plaintiff did not sustain an injury by accident.

In arguing for a different result, plaintiff contends that the Commission "erred in affording greater weight to Dr. Coin's testimony, as Dr. Coin was not competent to testify and his testimony was based upon mere conjecture and speculation." Plaintiff does not challenge Dr. Coin's qualification as an expert witness. Instead, he directs our attention to aspects of Dr. Coin's testimony that, in plaintiff's opinion, render it less compelling than other evidence. For example, plaintiff asserts that Dr. Coin's review of his medical history was incomplete and that some of Dr. Coin's opinions were contradicted by those of Dr. Gentry. Plaintiff also asserts as a "fact" that "Plaintiff suffered minor trauma - a twist, a turn, a jolt - which dissected the carotid artery and led to the stroke," although plaintiff did not testify to any sudden movement and the expert witnesses did not agree that such an incident caused his injury. In essence, plaintiff is asking us to reweigh the evidence, which we will not do:

Because it is the fact-finding body, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence. Accordingly, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight.

Shaw v. US Airways, Inc., __ N.C. App. __, __, 720 S.E.2d 688, 690 (2011) (quoting *Johnson v. Lowe's Cos.*, 143 N.C. App. 348, 350, 546 S.E.2d 616, 617-18 (2001) (internal citations and quotations omitted)). Plaintiff's argument that Dr. Coin's testimony was "incompetent" and based solely on "speculation" is without merit.

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V. Commission's Conclusions of Law

Plaintiff argues next that the Commission's conclusions of law are not supported by its findings of fact. Plaintiff does not assert that the Commission's conclusions do not logically rest upon its findings. Instead, he argues that the Commission should have made different findings, repeating earlier arguments, which we have rejected, concerning the evidentiary support for the Commission's findings. This argument is without merit.

VI. Commission's Interpretation of Statutory Law

Finally, plaintiff argues that "contrary to the well-settled law of the State of North Carolina, the Industrial Commission narrowly construed the North Carolina Workers' Compensation Act in detriment to the plaintiff." This argument lacks merit.

Plaintiff notes that the Workers' Compensation Act "'should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction.'" *Billings v. General Parts, Inc.*, 187 N.C. App. 580, 584, 654 S.E.2d 254, 257 (2007) (quoting *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (internal quotation omitted)). Plaintiff also points out that on appeal, in determining whether competent evidence supports the Commission's findings of fact, the "evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams* at 681, 509 S.E.2d at 414 (citing *Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937)).

Plaintiff contends that the Commission failed to follow these principles when it stated in Finding of Fact 10 that plaintiff had testified that he had large packages in his truck on 23 December 2011, but that he "did not testify as to whether those packages were any larger than the packages he regularly had to deliver." Plaintiff does not dispute the accuracy of this characterization of his testimony at the hearing. Rather, he directs our attention to an affidavit signed by plaintiff stating that his truck held packages that were unusually heavy. Plaintiff appears to argue, without citation to authority, that when the Commission resolves contradictions in the evidence or issues of credibility, it must employ the standard applicable to appellate review, and that the Commission erred when it "failed to take Plaintiff's affidavit in the light most favorable to Plaintiff[.]" However, "it is well-established that the Commission may

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accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted.” *Nobles v. Coastal Power & Elec., Inc.*, 207 N.C. App. 683, 693, 701 S.E.2d 316, 323 (2010) (citing *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 306-07, 661 S.E.2d 709, 715 (2008)). This argument is without merit.

For the reasons discussed above, we conclude that the Industrial Commission did not err and that its Opinion and Award should be

AFFIRMED.

Chief Judge MARTIN and Judge DILLON concur.

ELIZABETH HINSHAW, PLAINTIFF/MOTHER

v.

JOHN KUNTZ, DEFENDANT/FATHER

No. COA13-1184

Filed 1 July 2014

1. Child Custody and Support—actual income—bonus income—calculated as part of base income

The trial court erred in excluding the parties’ bonus income when calculating the parties’ actual income and the overall child support award. The North Carolina Child Support Guidelines include bonus income in the definition of income, and because the bonus income was not irregular or non-recurring, the trial court was required to include the bonus income in calculating the parties’ base income and the overall child support award.

2. Child Custody and Support—retroactive child support—valid, unincorporated separation agreement—no evidence of actual amounts expended

The trial court did not err in a child support case by failing to award retroactive child support from 1 September 2010 through the time plaintiff filed her complaint in district court. The trial court lacked authority to award retroactive child support because defendant, at all requisite times, abided by the terms of the parties’ valid, unincorporated separation agreement. Even if the trial court had had the authority, plaintiff failed to present evidence regarding the specific amounts she actually expended to support the minor

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children during the requisite period for which she sought retroactive child support.

3. Attorney Fees—child support—sufficient means to defray cost of litigation

The trial court did not err by denying plaintiff attorneys fees in a child support case. The trial court's finding of fact that plaintiff had sufficient means to defray the cost of litigation was supported by the record. Furthermore, the trial court did not find as fact that defendant refused to provide support which was adequate under the circumstances.

Appeal by plaintiff from judgment entered 8 May 2013 by Judge Paige B. McThenia in Mecklenburg County District Court. Heard in the Court of Appeals 9 April 2014.

HORACK TALLEY PHARR & LOWNDES, P.A., by Christopher T. Hood and Elizabeth J. James, for plaintiff.

Krusch & Sellers, P.A., by Rebecca K. Watts, for defendant.

ELMORE, Judge.

Elizabeth Hinshaw (plaintiff) appeals the trial court's 8 May 2013 child support award on the basis that the trial court erred in (1) failing to include bonus income in calculating the parties' base income, (2) denying her claim for retroactive child support, and (3) denying her motion for reasonable attorney's fees. After careful review, we find no error in the latter two issues, but hold that the trial court erred in the first. Accordingly, we affirm, in part, and reverse and remand, in part, for further action consistent with this opinion.

I. Background

Plaintiff and John Kuntz (defendant) were married in September 2001, separated in December 2006, and divorced in July 2010. The parties are the parents of three minor children, namely, A. Kuntz, born 15 September 2002; S. Kuntz, born 6 February 2004; and E. Hinshaw, born 27 January 2007 (the minor children). Plaintiff was awarded primary physical custody of the minor children pursuant to a Consent Order for Child Custody entered 16 April 2009. On 12 February 2009, the parties entered into a Settlement Agreement/Separation Agreement (the Agreement) whereby defendant agreed to pay plaintiff child support in the amount of \$1,750.00 per month and alimony in the amount of

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\$5,000.00 per month until 31 August 2010, the date on which his alimony obligation was to terminate. The Agreement further provided that, after alimony ended, the parties were to renegotiate the amount of child support defendant would pay plaintiff pursuant to the North Carolina Child Support Guidelines (the Guidelines). At the time the parties negotiated the Agreement, their combined adjusted gross income was less than \$25,000.00 per month.

When alimony ended, defendant voluntarily increased his child support payment from \$1,750.00 per month to \$2,750.00 per month. Plaintiff did not find this new sum to be an adequate support payment. The parties were subsequently unable to agree on an appropriate child support award; therefore, plaintiff filed a Motion in the Cause for Child Support on 29 March 2011. In her motion, plaintiff alleged that the amount of child support currently paid by defendant was not adequate to meet the needs of the minor children.

In its 8 May 2013 Child Support Order, the trial court made the following findings of fact: After spending a number of years as a stay-at-home parent, plaintiff was hired by Wells Fargo in April 2010. Plaintiff's gross base income from Wells Fargo totaled \$121,000.00 per year; she also earned approximately \$94.00 per month on a crossword puzzle business and \$48.00 in interest and dividend income. Therefore, plaintiff's gross yearly income totaled \$122,904.00. Plaintiff has received and can continue to expect an annual bonus from her employer. Defendant is employed by Bank of America earning an annual salary of \$211,000.00. Defendant has received and can continue to expect an annual bonus from his employer.

Based on these figures, the trial court found that the supporting parent's basic child support obligation could not be determined by using the child support schedule outlined in the Guidelines because the parents' combined adjusted gross income exceeded \$25,000.00 per month. Accordingly, the trial court determined that the minor children's reasonable needs and expenses totaled \$6,630.89 per month, with \$5,768.70 attributable to plaintiff's household and \$862.19 attributable to defendant's household. Based solely on the parties' monthly gross incomes—without accounting for bonus income—the trial court ordered defendant to pay sixty percent (60%) of the minor children's reasonable needs and expenses, which totaled \$3,978.53 per month. After crediting defendant \$862.19, the trial court set defendant's child support obligation at \$3,116.34 per month. Further, the trial court ordered defendant to pay \$8,425.82 in arrears (prospective child support). Both parties' motions for attorney's fees were denied in the 8 May 2013 order. Plaintiff now appeals.

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II. Analysis**A. Bonus Income**

[1] Plaintiff first argues that the trial court erred in excluding the parties' bonus income when calculating the parties actual income and the overall child support award. We agree.

"In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citations omitted). "Child support calculations under the guidelines are based on the parents' current [or actual] incomes at the time the order is entered." *Caskey v. Caskey*, 206 N.C. App. 710, 713, 698 S.E.2d 712, 714 (2010) (citations omitted). Under the Guidelines, "income" is defined as:

[A] parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, **bonuses**, dividends, severance pay, etc.) When income is received on an irregular, non-recurring, or one-time basis, the court may average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support. When income is received on an irregular, non-recurring, or one-time basis, the court may average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

N.C. Child Support Guidelines, 2012 Ann. R. N.C. 51. "Gross annual income in its plain, ordinary and popular sense means total income without deductions." *Saunders v. Saunders*, 52 N.C. App. 623, 624, 279 S.E.2d 90, 91 (1981) (internal quotations omitted). This definition "include[s] longevity pay [and] bonuses." *Id.*

In the case *sub judice*, the trial court found that both parties had received and remained eligible for an annual bonus. Specifically, the trial court found that defendant's 2011 bonus totaled \$114,002.20

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(\$28,500.00 of cash and \$85,502.20 of restricted stock); his 2010 bonus totaled \$114,000.00; and his 2009 bonus totaled \$37,500.00. Plaintiff's 2011 bonus totaled \$30,800.00, and her 2010 bonus totaled \$17,931.00, representing nine months of employment. However, in Finding #118 the trial court declined to incorporate the parties' bonus income in its calculation of the parties' base income for the following reason:

Given that the reasonable needs and expenses of the children are covered by the parties each month prior to the addition of bonus income deferred compensation, tuition reimbursement or other increases to base income, and given that both parties are eligible for a bonus each year, the Court declines to calculate bonus income, deferred compensation, tuition reimbursement or other increases to base income as part of child support.

On appeal, plaintiff contends that the trial court was required to include bonus income in calculating the parties' gross base income. Alternatively, defendant argues that because his bonus income is irregular or non-recurring, "the trial court is to address that income separately from the parties' gross monthly income when determining child support." Defendant avers: "The approach of separating out irregular or non-recurring income from regular, ongoing income . . . makes sense" given that there is no "guarantee" of receiving a bonus. We disagree with defendant and point out that he cites no authority to support his position.

First, we note that the plain language of the Guidelines clearly includes bonus income in the definition of "income." Should certain bonus or other income be deemed irregular or non-recurring, the Guidelines further instruct the trial court to average or pro-rate the income or order the obligor to pay a percentage of his or her non-recurring income equivalent to the percentage of his or her recurring income for child support. There is no provision in the Guidelines that instructs the trial court to completely separate irregular or non-recurring bonus income from its calculations. Second, we can infer that the trial court found that the bonus income was not irregular or non-recurring given that the order specifically stated each party had received and could expect an annual bonus. After reviewing the record, we agree that the bonus income did not constitute irregular or non-recurring income as contemplated by the Guidelines. Finally, there is no provision in the Guidelines which instructs the trial court that it may elect to opt out of including bonus income in its calculations based solely on the premise that the reasonable needs and expenses of the children are

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otherwise satisfied without its inclusion. Because the Guidelines include bonus income in the definition of income, and because the bonus income was not irregular or non-recurring, the trial court was required to include the bonus income in calculating the parties' base income and the overall child support award. Its failure to do so constituted an abuse of discretion. *See e.g., Waller v. Waller*, 20 N.C. App. 710, 713, 202 S.E.2d 791, 793 (1974) (holding that before ruling on a motion to modify child support, the trial court must give consideration to the fact that part of the defendant's income was a bonus which fluctuated from year to year).

B. Retroactive Child Support

[2] Plaintiff next argues that the trial court erred in failing to award retroactive child support from 1 September 2010 through the time she filed her complaint in district court. We disagree.

“Child support awarded prior to the time a party files a complaint is properly classified as retroactive child support.” *Carson v. Carson*, 199 N.C. App. 101, 105, 680 S.E.2d 885, 888 (2009) (quotation and internal citations omitted). “[R]etroactive child support payments are only recoverable for amounts actually expended on the child's behalf during the relevant period. Therefore, a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary.” *Robinson v. Robinson*, 210 N.C. App. 319, 333, 707 S.E.2d 785, 795 (2011) (quotations and citations omitted). “[W]here the parties have complied with the payment obligations specified in a valid, unincorporated separation agreement,” the trial court is prohibited from awarding retroactive child support, absent an emergency situation. *Carson* at 106-107, 680 S.E.2d at 889.

On appeal, plaintiff's argument is premised on the notion that the child support provision in the Agreement expired when defendant's obligation to pay alimony likewise expired. As such, plaintiff contends that the parties were not subject to a valid, unincorporated separation agreement as of 1 September 2010. Plaintiff avers, “the parties were, for purposes of child support, in a position procedurally analogous to that where parties separate without executing a separation agreement providing for child support.” Plaintiff's argument is similar to the argument advanced by the plaintiff-mother in *Carson*. In *Carson*, the parties entered into an unincorporated separation agreement in March 2008, which provided that the defendant-father would pay a child support obligation of \$500.00 per month until the parties were able to negotiate the terms of a consent order for child support. *Id.* at 103, 680 S.E.2d at

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887. In the event the parties were unable to negotiate a consent order within one year, the separation agreement stated that either party could file a complaint in district court. *Id.* The parties never negotiated the terms of a consent order; the defendant-father continued to pay \$500.00 per month in child support. *Id.*

Eight years passed before the plaintiff-mother filed a complaint in district court seeking retroactive child support, claiming that she was “entitled to reimbursement from defendant for a portion of the actual expenses incurred for the benefit of the minor child from August 2003 through the present.” *Id.* at 104, 680 S.E.2d at 887 (internal quotation omitted). The trial court ordered the defendant-father to pay \$31,036.85 in retroactive and prospective child support from September 2003 through January 2008. *Id.* at 104, 680 S.E.2d at 888. On appeal, the defendant-father argued that the trial court erred in awarding the plaintiff-mother retroactive child support because he had consistently paid \$500.00 per month in accord with the terms of the parties’ separation agreement. *Id.* at 105, 680 S.E.2d at 888. This Court held that, because the defendant-father fully complied with the terms of the valid, unincorporated separation agreement, the trial court was prohibited from awarding retroactive child support in excess of the stated terms of the separation agreement. *Id.* at 108, 680 S.E.2d at 890 (holding “where there is a valid, unincorporated separation agreement, which dictates the obligations of the parent providing support, and the parent complies fully with this obligation, the trial court is not permitted to award retroactive child support absent an emergency situation”).

In the instant case, plaintiff’s argument that the child support provision “expired” is without merit. Here, the parties were operating under a valid, unincorporated separation agreement which clearly intended for defendant to continue making child support payments after the expiration of the alimony term. It is undisputed that defendant made monthly payments pursuant to the terms of the Agreement from the time it became effective until the time plaintiff filed a complaint in district court. Defendant even voluntarily increased his support payment from the mandated \$1,750.00 per month to \$2,750.00 per month. Should plaintiff have found \$2,750.00 to be an acceptable support payment, the parties could have operated under the terms of the Agreement indefinitely. On these facts, the trial court lacked authority to award retroactive child support because defendant, at all requisite times, abided by the terms of the valid, unincorporated separation agreement. Accordingly, the trial court did not err in denying plaintiff’s claim for retroactive child support.

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Assuming *arguendo* that the trial court had authority to award retroactive child support, plaintiff's argument remains unconvincing. Again, retroactive child support is based on the non-custodial parent's share of the reasonable actual expenditures made by the custodial parent on behalf of the child. *Robinson, supra*. The record discloses that plaintiff failed to present evidence to the trial court regarding the specific amounts she actually expended to support the minor children during the requisite period for which she sought retroactive child support. As such, plaintiff failed to meet her burden of proof. The trial court did not err in declining to award plaintiff retroactive child support on these facts. Having found that the original terms of the Agreement were not reasonable to meet the children's needs, the trial court was justified in awarding prospective child support in the amount of \$8,425.82.

C. Attorney's Fees

[3] Lastly, plaintiff argues that the trial court erred in denying her motion for an award of attorney's fees. We disagree.

In a child support action, the trial court has discretion to award attorney's fees to "an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6 (2013). Whether a party has satisfied these requirements is a question of law fully reviewable on appeal. *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000) (citation omitted). Generally, the dependent spouse has insufficient means to defray the costs of litigation if he or she is unable "as litigant to meet the supporting spouse as litigant on substantially even terms." *Theokas v. Theokas*, 97 N.C. App. 626, 630-31, 389 S.E.2d 278, 281 (1990) (citation omitted). In addition, "[b]efore ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has **refused to provide support which is adequate** under the circumstances existing at the time of the institution of the action or proceeding[.]" N.C. Gen. Stat. § 50-13.6 (emphasis added).

In the instant action, both parties requested an award of attorney's fees. Specifically, plaintiff sought to recover "at least" \$25,265.50 in attorney's fees from defendant. In its order, the trial court found that neither party was entitled to recover attorney's fees because each had sufficient means to defray the cost of litigation. On appeal, our focus hinges on whether plaintiff had sufficient funds to defray the costs of litigation. "With regard to this determination, a court should generally focus on the disposable income and estate of just that spouse, although a comparison of the two spouses' estates may sometimes be appropriate."

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Barrett at 374, 536 S.E.2d at 646 (citation omitted). Having reviewed the trial court's findings, we find them to be sufficient to form a basis to deny plaintiff attorney's fees. Excluding bonus income, plaintiff's monthly gross income is \$10,242.00, and her reasonable needs total \$3,183.87. After paying \$2,652.35 per month towards the minor children's reasonable needs, plaintiff is left with a surplus of \$4,405.78 per month. This alone supports the trial court's determination that plaintiff had sufficient means to defray the cost of litigation.

Further, the trial court did not find as fact that defendant refused to provide support which was adequate under the circumstances. *See* N.C. Gen. Stat. § 50-13.6. The record indicates that defendant complied with the terms of the Agreement directing him to make child support payments; in fact, he voluntarily made support payments in excess of what he was required to pay. This evidence further supports the trial court's decision to deny plaintiff's motion for attorney's fees. *See Prescott v. Prescott*, 83 N.C. App. 254, 262, 350 S.E.2d 116, 121 (1986) (holding that the trial court did not abuse its discretion in denying wife's motion for reasonable attorney's fees in connection with her child support action when the husband paid adequate child support and voluntarily made additional support payment which he was not obligated to make under the parties' consent order). We hold that the trial court's findings of fact are supported by competent evidence and conclude that it was not an abuse of discretion for the trial court to deny plaintiff's motion for an award of attorney's fees.

III. Conclusion

The trial court did not err in denying plaintiff's motions for retroactive child support and for attorney's fees. However, by excluding the parties' bonus income in its calculation of the parties' gross base income, the trial court did err in calculating its child support award. We reverse the requisite portions of the trial court's order and remand so that the trial court can include the bonus income in its calculations. We further instruct the trial court to recalculate the supporting parent's child support obligation accordingly.

Affirmed, in part; reversed and remanded, in part.

Judges McCULLOUGH and DAVIS concur.

MAGAZIAN v. CREAGH

[234 N.C. App. 511 (2014)]

VICTOR E. MAGAZIAN, PLAINTIFF

v.

JAMES J. CREAGH, DEFENDANT

No. COA14-230

Filed 1 July 2014

Appeal and Error—notice of appeal—not timely

An appeal was dismissed as untimely where the order from which plaintiff attempted to appeal was entered on 20 September 2013, a Friday, and plaintiff acknowledged in his notice of appeal that he received actual notice of the order by email on 25 September 2013, the following Wednesday. Plaintiff received actual notice within three days of entry of the order, excluding the intervening Saturday and Sunday, and had to file his notice of appeal within 30 days of entry of the order, or by 21 October. However, he did not file his notice of appeal until 25 October 2013.

Appeal by Plaintiff from Order entered 20 September 2013 by Judge Paul Gessner in Wake County Superior Court. Heard in the Court of Appeals 4 June 2014.

Kerner Law Firm, PLLC, by Thomas W. Kerner, for Plaintiff.

Smith, Debnam, Narron, Drake, Saintsing & Myers, L.L.P., by Bettie Kelley Sousa, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

This appeal arises from an action to “renew” a judgment. A Connecticut State court purportedly entered a judgment against Defendant James J. Creagh for a deficiency balance in favor of New Milford Savings Bank in the State of Connecticut on 11 March 2001¹.

1. We note that, although both parties refer to the previous judgment in their briefs, no copy of the foreign judgment was included in the record on appeal. Thus, we are unable to confirm any details of the judgment. Counsel are reminded that N.C. R. App. P. 9(a)(1)(j) requires the inclusion “of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal. . . .” N.C.R. App. P. 9(a)(1)(j) (2013). Thus, even had this appeal been timely, failure to include the foreign judgment would have prevented resolution of the issue of timeliness of the action to renew the judgment.

MAGAZIAN v. CREAGH

[234 N.C. App. 511 (2014)]

Plaintiff Victor E. Magazian claims to be a successor in interest to New Milford Savings Bank. Plaintiff previously filed a Notice of Filing of Foreign Judgment against Defendant in Wake County Superior Court on 6 December 2002.

On 3 December 2012, Plaintiff filed a “Complaint to Renew Judgment” in Wake County Superior Court.² Defendant answered on 6 February 2013 and filed a motion for summary judgment on 30 August 2013. Plaintiff also filed a motion for summary judgment on 6 September 2013. Both summary judgment motions came on for hearing on 16 September 2013. The court granted Defendant’s motion, denied Plaintiff’s motion, and dismissed the action with prejudice by order entered on 20 September 2013. Plaintiff received actual notice of the dismissal order by email on 25 September 2013³ and filed a notice of appeal on 25 October 2013.

Discussion

On appeal, Plaintiff argues that the trial court erred by (1) granting Defendant’s motion for summary judgment and (2) denying Plaintiff’s motion for summary judgment. Plaintiff contends that the Notice of Filing of Foreign Judgment filed on 6 December 2002 acted as a new North Carolina judgment, and therefore Plaintiff was within the ten-year statute of limitations when he instituted the new action in December 2012. Thus, Plaintiff argues that he was entitled to judgment as a matter of law. Similarly, Plaintiff argues that Defendant’s motion for summary judgment failed to show that there was no genuine issue of material fact as to whether Plaintiff was entitled to maintain his 2012 action. Because Plaintiff’s appeal is untimely, we dismiss.

In civil actions, the notice of appeal must be filed “within thirty days after entry of the judgment if the party has been served with a copy of the judgment within the three day period” following entry of the judgment. N.C.R. App. P. 3(c)(1) (2013); N.C. Gen. Stat. § 1A-1, Rule 58 (2013).

2. There is a ten-year statute of limitations on an action upon a judgment. N.C. Gen. Stat. § 1-47(1) (2013). Despite the language used in the caption of Plaintiff’s complaint, the original judgment may not be “renewed” for an additional ten-year period. However, a creditor may obtain a new judgment by instituting a separate action based on the original judgment within the ten-year statute of limitations period. *See, e.g., Duplin County DSS v. Frazier*, __ N.C. App. __, __, 751 S.E.2d 621, 625 (2013). The creditor will then have the applicable ten-year statute of limitations to enforce the new judgment. N.C. Gen. Stat. § 1-47(1).

3. The record does not contain a copy of the email and does not reflect who sent the email to Plaintiff. Plaintiff states in his notice of appeal that the order was “served on counsel for the Plaintiff via email” on 25 September 2013.

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[234 N.C. App. 511 (2014)]

The three day period excludes weekends and court holidays. N.C. Gen. Stat. § 1A-1, Rule 6(a) (2013). Email is not a valid method of service under the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 4 (2013). However, when a party receives actual notice that a judgment has been entered, the service requirements of Rule 3(c) are not applicable, and actual notice substitutes for proper service. *Manone v. Coffe*, N.C. App. ___, ___, 720 S.E.2d 781, 784 (2011). Failure to file a timely notice of appeal is a jurisdictional flaw which requires dismissal. *Id.* at ___, 720 S.E.2d at 782.

The order from which Plaintiff attempts to appeal was entered on 20 September 2013, a Friday. Plaintiff acknowledges in his notice of appeal that he received actual notice of the order by email on 25 September 2013, the following Wednesday. Plaintiff received actual notice within three days of entry of the order, excluding the intervening Saturday and Sunday. Therefore, to be timely, the Rules of Appellate Procedure required Plaintiff to file his notice of appeal within 30 days of entry of the order. In other words, Plaintiff needed to file his notice of appeal on or before 21 October 2013. Because Plaintiff did not file his notice of appeal until 25 October 2013, the appeal is not timely and this court lacks jurisdiction. Accordingly, we dismiss.

DISMISSED.

Judges STROUD and McCULLOUGH concur.

MILLER v. MISSION HOSP., INC.

[234 N.C. App. 514 (2014)]

DEBORAH MILLER, EMPLOYEE, PLAINTIFF

v.

MISSION HOSPITAL, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. COA13-1310

Filed 1 July 2014

1. Workers' Compensation—compensable injury—aggravation of pre-existing injury—separate injury

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff had sustained an aggravation of a pre-existing condition without also concluding that she had suffered a disc herniation. There was no evidence that defendant attempted to "void" the Form 60 and plaintiff was not prejudiced by the Commission's characterization of her admittedly compensable injury as an aggravation of her pre-existing condition rather than an aggravation of her condition and also a separate disc herniation.

2. Workers' Compensation—further medical compensation—Parsons presumption—burden shifted back to plaintiff

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff did not need further medical compensation. Defendant had rebutted the presumption that arose by virtue of the filing of a Form 60 and pursuant to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, the burden shifted back to plaintiff to establish her continuing need for medical treatment. Plaintiff failed to meet this burden and failed to present evidence of disability.

3. Workers' Compensation—plaintiff no longer disabled—supported by findings

The Industrial Commission did not err in a workers' compensation case by allowing defendant to stop paying indemnity compensation to plaintiff. The Commission's conclusion that plaintiff was no longer disabled and was able to return to work was supported by the findings.

Appeal by Plaintiff from Opinion and Award entered 6 August 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 April 2014.

Root & Root, PLLC, by Louise Critz Root, for plaintiff-appellant.

Brewer Defense Group, by Joy H. Brewer and Ginny P. Lanier, for defendant-appellee.

MILLER v. MISSION HOSP., INC.

[234 N.C. App. 514 (2014)]

STEELMAN, Judge.

Where the Industrial Commission held that defendant had rebutted the presumption that arose by virtue of the filing of a Form 60 and pursuant to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), the burden shifted back to plaintiff to establish her continuing need for medical treatment. Where plaintiff failed to meet this burden and failed to present evidence of disability, the Commission properly ordered indemnity and medical compensation to plaintiff terminated.

I. Factual and Procedural Background

Deborah Miller (plaintiff) was born in 1952 and began working for Mission Hospital (defendant) around 1988. In 2003 plaintiff was diagnosed with non-work related cervical spondylosis, a degenerative spinal condition. She underwent cervical fusion surgery at C3-C4 and returned to work in early 2004. On 10 June 2009 plaintiff suffered a compensable injury by accident that aggravated her pre-existing back condition. She was referred to Dr. Stephen David, who treated her from 12 June 2009 until early 2012. Plaintiff had an MRI scan on 14 June 2009. Dr. David reviewed the results and observed a “disc protrusion at C2-C3” that had not been present in an MRI performed in January 2003. Dr. David believed that the C2-3 disc herniation was a contributing cause of her symptoms, in addition to the exacerbation of her chronic spinal condition.

On 2 July 2009 defendant filed an Industrial Commission Form 60 admitting the compensability of plaintiff’s claim for workers’ compensation benefits and describing her injury as a C2-3 disc herniation. Tests performed at the direction of Dr. David revealed that the C2-3 disc herniation was not impinging upon plaintiff’s spinal nerves. However, plaintiff reported significant pain and difficulty in performing daily activities to Dr. David, who treated her with cervical epidural injections, physical therapy, heat and ice on the affected areas, and various medications.

On 2 February 2010 plaintiff had a functional capacity evaluation, and on 12 February 2010 Dr. David examined plaintiff and reviewed the results of the evaluation. He concluded that plaintiff had reached maximum medical improvement and could return to work full time, with restrictions. However, a few weeks later, plaintiff reported to Dr. David that her symptoms had gotten worse. Dr. David found plaintiff “difficult to treat” because, despite the variety of treatments she did not have “any significant break-throughs,” and his notes from 16 June 2010 state that he found it necessary to “write her out of work permanently.”

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Defendant hired a private investigator, who made videos in March 2010 depicting plaintiff engaging in daily activities over a number of days. On 19 April 2011 plaintiff was examined by Dr. Dennis White, a specialist in pain medicine. He initially diagnosed plaintiff with ‘peripheralized’ pain in “a global, nonspecific pain pattern.” However, when Dr. White viewed the video surveillance of plaintiff, he found her movements as shown on the surveillance video to be inconsistent with her behavior and with the symptoms she reported during his examination.

Dr. Craig Brigham, an orthopedic surgeon who specializes in spine surgery, examined plaintiff on 27 January 2011 and found her to have a “near full range of motion of her cervical spine” as well as a “normal range of motion of the shoulders.” Dr. Brigham saw no objective reason that plaintiff could not return to full duty work without restriction, and opined that the consequences of her work injury had resolved and that no further treatment was needed. Dr. Dahari Brooks, an orthopedic specialist, reviewed plaintiff’s medical records, Dr. Brigham’s notes and the surveillance videos. Based upon his review of these records, Dr. Brooks agreed with Dr. Brigham’s assessment. He observed that the videos showed plaintiff engaging in activities that were inconsistent with the subjective complaints noted in her medical records, and that her physical motions in the surveillance videos did not correlate with the restricted motion she described during her office visits. He testified that Plaintiff was capable of returning to full duty work without restriction and did not need further medical treatment.

On 23 August 2011 plaintiff filed an Industrial Commission Form 33 requesting that her claim be assigned for hearing. The Full Commission issued its Opinion and Award on 6 August 2013. The Commission concluded that plaintiff had “regained the capacity to earn the same wages she was earning at the time of the injury in the same employment, and therefore, she is not disabled” and that “there is no need for ongoing medical treatment in this case related to Plaintiff’s injury by accident on June 10, 2009.” The Commission ordered defendant to “stop payment of indemnity and medical compensation to Plaintiff.”

Plaintiff appeals.

II. Standard of Review

The standard of review in workers’ compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. . . . Under the Workers’ Compensation Act, ‘[t]he Commission is the sole judge of the credibility of the witnesses and the weight

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to be given their testimony.’ Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law. This ‘court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.’ “[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.’” The “Commission’s conclusions of law are reviewed *de novo*.”

Spivey v. Wright’s Roofing, __ N.C. App. __, __, 737 S.E.2d 745, 748-49 (2013) (quotations and citations omitted).

III. Commission’s Description of Plaintiff’s Injury

[1] In her first argument, plaintiff contends that the Commission erred in Conclusion of Law No. 1 by holding “that plaintiff had sustained an aggravation of a pre-existing condition” without holding that she had also suffered a disc herniation. Plaintiff does not dispute that she had a pre-existing spinal condition or challenge the evidentiary support for the Commission’s finding that her compensable injury included an exacerbation of this pre-existing condition. Instead, she contends that it was error for the Commission not to specify that she also suffered a disc herniation. Plaintiff appears to argue that (1) defendant attempted “to void the agreement” represented by the execution of an Industrial Commission Form 60 by denying that she had a disc herniation as stated on the Form 60, and that (2) whether or not she suffered a disc herniation was a disputed issue of legal significance which the Commission was required to resolve. We disagree with both assertions.

Plaintiff does not identify any evidentiary basis for her assertion that defendant attempted to have the Form 60 set aside. For example, she does not contend that defendant filed a motion to have the Form 60 set aside, or that defendant ever denied that plaintiff suffered a compensable injury as admitted by the Form 60. The forms filed by the parties make it clear that they agreed that plaintiff had suffered a compensable injury in 2009, but disagreed about whether or not she remained disabled or needed further medical treatment several years later. In the Industrial Commission Form 33 that plaintiff filed to request a hearing, she asserted that “Plaintiff maintains and defendants deny that plaintiff is permanently and totally disabled.” In the Form 33R that defendant

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filed in response, defendant asserted that “Plaintiff has failed to present sufficient evidence to establish that she remains disabled as a result of her compensable injury or that she is permanently and totally disabled.” Thus, both parties characterized their dispute as a disagreement about the duration of plaintiff’s disability, and not as a conflict about the nature of her original injury or the validity of the Form 60.

Plaintiff also fails to articulate why the Commission was required to make more detailed findings about her original injury in its determination of whether she was entitled to continued disability or medical compensation at the time of the hearing. Moreover, in its Conclusion of Law No. 3 the Commission specifically addressed the legal implications of the fact that the Form 60 characterizes plaintiff’s injury as a disc herniation. Plaintiff fails to explain how she was prejudiced by the Commission’s failure to specify that she had a C2-3 disc herniation in its Conclusion No. 1, given that this issue is expressly addressed in another conclusion of law.

We hold that there is no evidence that defendant attempted to “void” the Form 60, and that plaintiff was not prejudiced by the Commission’s characterization of her admittedly compensable injury as an aggravation of her pre-existing condition rather than an aggravation of her condition and also a separate disc herniation.

This argument is without merit.

IV. Cessation of Medical Compensation

[2] In her next argument, plaintiff asserts that the Commission’s conclusion that she did not need further medical compensation was “not supported by the evidence of record or applicable law.” We disagree.

Medical compensation is defined as “medical, surgical, hospital, nursing, and rehabilitative services” that “may reasonably be required to effect a cure or give relief” or “tend to lessen the period of disability[.]” N.C. Gen. Stat. § 97-2(19). “In a workers’ compensation claim, the employee ‘has the [initial] burden of proving that his claim is compensable.’” *Holley v. Acts, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (quoting *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950)). “The degree of proof required of a party plaintiff under the Act is the ‘greater weight’ of the evidence or ‘preponderance’ of the evidence.” *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995). “The employer’s filing of a Form 60 is an admission of compensability.” *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 293 (2005) (citing *Sims v. Charmes/Arby’s Roast Beef*,

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142 N.C. App. 154, 159, 542 S.E.2d 277, 281 (2001)). “Where a plaintiff’s injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury.” *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292 (citing *Reininger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999), and *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997)). If the defendant rebuts the *Parsons* presumption, the burden of proof shifts back to the plaintiff. See *McCoy v. Oxford Janitorial Service Co.*, 122 N.C. App. 730, 733, 471 S.E.2d 662, 664 (1996) (“[T]he signing of the Form 21 agreement established a presumption of the plaintiff’s disability. The defendant then presented evidence . . . successfully rebutting plaintiff’s presumption of disability, and the burden shifted back to the plaintiff.”).

As discussed above, defendant admitted the compensability of plaintiff’s injury by filing a Form 60 on 22 June 2009. Therefore, the issue before the Commission was not whether plaintiff had suffered a compensable workplace accident in 2009, or whether she experienced a C2-3 disc herniation, but whether at the time of the hearing she required any further medical treatment for her injury. In this regard, the Commission found in relevant part that:

...

3. On June 10, 2009, Plaintiff sustained an injury by accident arising out of and in the course of her employment with Defendant[.]

...

6. Plaintiff was referred to Dr. Stephen Michael David . . . and began treating with him on June 12, 2009. Plaintiff received conservative treatment from Dr. David from mid-2009 through early 2012[.] . . .

7. Dr. David recommended a cervical MRI, which was done on June 14, 2009. . . . In the opinion of Dr. David, the June 2009 cervical MRI revealed the prior surgical fusion at C3-C4, cervical spondylosis with broad-based disc osteophyte formation at C5-C6, as well as a new central disk protrusion at C2-3. . . .

...

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9. Nerve conduction studies were done on January 12, 2010, . . . [which showed] no evidence of cervical entrapment. . . .

. . .

11. . . . [O]n February 12, 2010 . . . Dr. David assessed Plaintiff at maximum medical improvement . . . [and] released her to return to work with restrictions[.] . . .

12. Shortly after being released to return to work with restrictions, Plaintiff returned to Dr. David on March 2, 2010, reporting an aggravation of her neck pain. . . .

. . .

14. Defendant engaged a private investigator to conduct surveillance on Plaintiff. . . .

15. . . . [The video surveillance] shows Plaintiff engaging in many of the activities of daily living. Her movements have been noted to be inconsistent with what was expected by the physicians, based upon her presentations in their offices. The video shows more fluid and natural movement than Plaintiff demonstrated in the offices of the physicians or at the hearing before Deputy Commissioner Ledford.

. . .

21. . . . Plaintiff was examined on April 19, 2011 by Dr. Dennis White, a specialist in pain medicine. Upon examination, Dr. White noted that Plaintiff appeared to be in distress, guarding her neck movements and avoiding any flexion of the neck or gestural range of motion while communicating. According to Dr. White, Plaintiff was deliberately avoiding any movement because of pain. . . .

. . .

23. . . . Dr. White viewed the video of the surveillance of Plaintiff. He found her movements on the surveillance [video] to be inconsistent with what she demonstrated at the time of the examination[, and testified that] Plaintiff's movement on the surveillance video was natural, spontaneous, gestural, and rhythmic, and that he "didn't see any sign of distress whatsoever." . . .

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24. Dr. Craig Brigham, an orthopedic surgeon who specializes in spine surgery, examined Plaintiff on January 27, 2011[.] . . . Dr. Brigham found no neurological abnormalities and no motor deficits. Dr. Brigham found “near full range of motion of her cervical spine considering she has had a 1-level fusion as well as normal range of motion of the shoulders.” . . .

25. Dr. Brigham testified that he saw no acute distress when he examined Plaintiff and . . . no objective basis as to why Plaintiff could not return to full duty work without restriction[.] . . . based upon his review of the medical records and what he found to be a lack of objective evidence of ongoing problems, as well as the inconsistencies noted in his physical examination of Plaintiff. He opined that any consequences of the work injury had resolved and no further treatment was needed.

26. Dr. Dahari Brooks, an orthopaedic specialist, conducted a medical records review . . . [and] agreed with the assessment of Dr. Brigham. In his opinion, the surveillance footage he reviewed showed Plaintiff engaging in activities which were inconsistent with her subjective pain complaints[.] . . . Plaintiff’s physical motions as seen in the surveillance footage failed to correlate with the restricted motion she described during the course of her office visits. . . . Dr. Brooks opined that Plaintiff was capable of returning to full duty work without restriction and that she would not need further medical treatment.

. . .

33. Based upon a preponderance of the evidence in view of the entire record, the Full Commission does not find Plaintiff’s testimony regarding the nature and severity of her complaints to be credible.

34. In assessing the expert medical testimony, the Full Commission places greater weight on the testimony of Dr. Brooks, Dr. White, and Dr. Brigham, as opposed to that of Dr. David[.] . . . There is no objective basis for Plaintiff’s complaints of ongoing, disabling . . . pain, and these complaints are belied by the video surveillance evidence. . . . Dr. David’s opinions are based in large part on Plaintiff’s

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subjective complaints, which the Full Commission does not find credible.

Plaintiff has not challenged the evidentiary support for these findings of fact, which are therefore binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). We hold that these findings support the Commission's conclusion that "any consequences of Plaintiff's work-related injury have resolved and that there is no need for ongoing medical treatment in this case related to Plaintiff's injury by accident on June 10, 2009."

In arguing for a different result, plaintiff appears to argue that the Form 60 automatically entitles her to additional medical compensation. However, in Conclusion No. 3 the Commission addressed the implications of defendant's execution of the Form 60 and stated that:

3. Since Defendant filed a Form 60 admitting the compensability of Plaintiff's injury to her spine, specifically her "C2-3 Disk Herniation," there is a rebuttable presumption that the additional medical treatment for her spine is directly related to the compensable injury. . . . *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997). . . . Defendant has successfully rebutted the *Parsons* presumption with competent, credible medical evidence that any consequences of Plaintiff's work-related injury have resolved and that there is no need for ongoing medical treatment in this case related to Plaintiff's injury by accident on June 10, 2009. Therefore, the burden shifted back to Plaintiff to prove that her medical conditions are related to her accident at work on June 10, 2009. The Full Commission concludes that Plaintiff has failed to meet this burden, and therefore, Defendant is not responsible for ongoing medical compensation.

This conclusion acknowledges the presumption arising under *Parsons* from the Form 60, but concludes that defendant successfully rebutted the presumption and that plaintiff failed to meet her burden to produce competent medical evidence that her claim for ongoing medical benefits was "related to her accident at work on June 10, 2009." Plaintiff has not challenged the factual or evidentiary support for this conclusion of law, or disputed its legal validity. We hold that the Commission did not err by concluding that plaintiff was not entitled to further medical benefits arising from this claim.

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[234 N.C. App. 514 (2014)]

V. Cessation of Indemnity Compensation

[3] Finally, plaintiff asserts that the Commission “erred by allowing [defendant] to stop paying indemnity compensation to plaintiff.” We disagree.

N.C. Gen. Stat. § 97-2(9) defines “disability” as an “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” In is well-established that:

The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (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.

Russell v. Lowe’s Product Distribution, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982), *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 443-44, 342 S.E.2d 798, 809 (1986), and *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550 (1991)). In this case, the Commission concluded in relevant part that:

2. Plaintiff bears the burden of proving disability. . . . In the case at bar, Plaintiff has failed to prove disability under any prong of *Russell*. Moreover, the competent, credible evidence of record establishes that as of January 27, 2011, Plaintiff had regained the capacity to earn the same wages she was earning at the time of the injury in the same employment, and therefore, she is not disabled within the meaning of N.C. Gen. Stat. § 97-2(9). . . .

MILLER v. MISSION HOSP., INC.

[234 N.C. App. 514 (2014)]

This conclusion is supported by the findings quoted above in relation to the issue of plaintiff's entitlement to further medical benefits, by the Commission's findings detailing plaintiff's physical abilities as depicted on the surveillance videos, and by its findings that:

. . .

25. Dr. Brigham testified that he saw no acute distress when he examined Plaintiff and that he saw no objective basis as to why Plaintiff could not return to full duty work without restriction. . . .

26. . . . Based upon his review of the medical records, as well as the surveillance, Dr. Brooks opined that Plaintiff was capable of returning to full duty work without restriction and that she would not need further medical treatment.

Plaintiff acknowledges that these findings support the Commission's conclusion that she was no longer disabled. However, she appears to argue that, because the Form 60 specified that she had suffered a C2-3 disc herniation, the Commission could not properly rely upon an expert's opinion regarding disability unless the expert "formed this diagnosis [of a disc herniation] as a basis of their opinion." However, the Form 60, although establishing the compensability of her 9 June 2009 injury, did not give rise to any legal presumption regarding whether she remained disabled in 2012. The "use of the Form 60 did not entitle plaintiff to a presumption of continuing temporary disability[.]" *Sims*, 142 N.C. App. at 160, 542 S.E.2d at 282. The Commission's ruling on plaintiff's claim for disability required it to determine whether or not plaintiff was capable of returning to work. Plaintiff cites no authority in support of her contention that an expert's opinion on her ability to return to work in 2012 requires the expert to agree that in 2009 plaintiff suffered the specific injury set out in the Form 60. In other words, plaintiff fails to articulate how the fact that the Form 60 described her injury as a C2-3 disc herniation is relevant to the question of whether or not the symptoms arising from plaintiff's June 2009 compensable injury had resolved several years later. We hold that the expert opinions of Dr. Brooks and Dr. Brigham that plaintiff was capable of returning to work were not invalidated by the fact that their assessment of plaintiff's condition was not based on their agreement that plaintiff suffered a disc herniation as a result of her compensable injury, and that the Commission did not err by ruling that plaintiff was no longer disabled.

ROBERTSON v. STERIS CORP.

[234 N.C. App. 525 (2014)]

For the reasons discussed above, we hold that the Commission did not err and that its Opinion and Award should be

AFFIRMED.

Judges HUNTER, Robert C., and BRYANT concur.

TERRI LYNN ROBERTSON AND MARY DIANNE DANIEL, PLAINTIFFS
v.
STERIS CORPORATION, A DELAWARE CORPORATION, ET AL., DEFENDANTS

No. COA13-1301

Filed 1 July 2014

1. Attorney Fees—claim for fees in quantum meruit—subject matter jurisdiction—personal jurisdiction—jurisdiction over settlement

The trial court did not err in an attorney fees and costs dispute by conducting a hearing on the attorney's claims. The trial court had subject matter jurisdiction, personal jurisdiction over plaintiffs, and jurisdiction over plaintiffs' settlement funds. Moreover, the attorney was not required to bring his claims for fees and costs against plaintiffs in a separate action because an attorney may properly bring a claim for fees in quantum meruit against a former client by the filing of a motion in the underlying action to be resolved by the trial court via a bench trial.

2. Attorney Fees—motion to intervene—not required—motion in the cause sufficient

The trial court did not err in an attorney fees and costs dispute in its handling of the attorney's motion to intervene in the underlying case. A dismissed attorney seeking legal representation fees and costs can pursue his claims against his former clients by the filing of a motion in the cause. Accordingly, both the motion to intervene and the allowance of that motion in this case were wholly unnecessary to permit the judge to reach and resolve the merits of the attorney's motion in the cause.

3. Attorney Fees—award—not against public policy

The trial court's award of fees and costs to an attorney in an attorney fees and costs dispute did not violate the public policy

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requiring that contingency fees be in writing as stated in Rule 1.5(c) of the Revised Rules of Professional Conduct of the North Carolina State Bar. The Rules, precedent from our Supreme Court, and decisions by previous panels of the Court of Appeals all reject the argument.

4. Attorney—sanctions—discovery violation—no abuse of discretion

The trial court did not abuse its discretion in determining the sanction to impose upon the attorney involved in an attorney fees and costs dispute for his actions during discovery. Finding of fact 46 contained an entirely sufficient explanation of the court's decision to sanction the attorney.

Appeal by Plaintiffs from order entered 7 February 2013 by Judge D. Jack Hooks, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 9 April 2014.

The Lorant Law Firm, by D. Bree Lorant, and Womble, Carlyle, Sandridge & Rice, LLP, by Burley B. Mitchell, Jr., and Robert T. Numbers, II, for Plaintiffs.

No brief for Defendants.

Young Moore and Henderson P.A., by Walter E. Brock, Jr., and Andrew P. Flynt, for Intervenor G. Henry Temple, Jr., and Temple Law Firm, PLLC.

STEPHENS, Judge.

Procedural History and Factual Background

In 2004, Plaintiffs Terri Lynn Robertson and Mary Dianne Daniel were allegedly injured by the release of toxic liquids and gases from a sterilization machine while they were at work at Brunswick County Hospital. On 19 January 2007, G. Henry Temple, Jr., of the Temple Law Firm, PLLC, filed a complaint in Brunswick County Superior Court on behalf of Plaintiffs seeking damages for personal injuries against various defendants (“the underlying lawsuit”). No written contract regarding legal representation was executed between Temple and Plaintiffs. Plaintiffs asserted that Temple never discussed his contingency fee rate with them and Temple himself could not recall doing so, but Travis Harper, an attorney working for the Temple Law Firm, testified that

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Temple did tell Plaintiffs that “their individual recoveries would be after costs and attorney fees[.]” Temple did explain that, if he lost the case, he would pay all costs of the litigation. The underlying lawsuit was designated as exceptional by the Chief Justice pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and the Honorable D. Jack Hooks, Jr., was appointed as presiding judge.

When Plaintiffs first approached Temple in November 2006, Temple had concerns about the viability of their claims. He was particularly concerned that the statute of repose for product liability claims would operate to bar the lawsuit. Two other attorneys had already declined to take case, and Temple told Plaintiffs he would need to investigate before making a decision. As the case proceeded, it proved even more complex and problematic than Temple had anticipated. Early on, Judge Hooks ruled that all product liability claims were barred by the applicable statute of repose, and Temple shifted his theory of the case to an attempt to prove inadequate maintenance of the sterilization machine. By the time of the first round of mediation in May 2010, the costs that Temple had incurred in pursuit of the lawsuit were approximately \$150,000, but Plaintiffs were offered only \$270,000 total to settle. Plaintiffs did receive workers’ compensation benefits and settlements of several hundred thousand dollars each for their workers’ compensation claims. During pendency of the litigation, claims against all defendants except Steris Corporation and Seal Master Corporation¹ were dismissed. Trial was set for 14 March 2011, and a second round of mediation was ordered for 2 March 2011.

Temple’s research with two mock juries indicated that Plaintiffs would likely lose the case based on problems with Plaintiffs’ credibility and other issues. Consultants working with Temple urged him to settle, and Temple reached a confidential settlement with Seal Master before mediation. During mediation, Temple also reached a confidential settlement with Steris for an amount the consultants considered surprisingly high. However, a dispute arose between Plaintiffs and Temple regarding Temple’s fees and costs. Temple sought 40% of Plaintiffs’ recovery after costs, and Plaintiffs felt that percentage was too high. Plaintiffs signed releases of their claims as to Steris and Seal Master,

1. Seal Master produced the seals used by Steris in the manufacture of the sterilization machine which allegedly malfunctioned. The complaint in the underlying lawsuit refers to Seal Master as “Seal Master Corporation, aka Sealmaster, Inc.” Some documents in the record on appeal, including the order appealed from, refer to this defendant as “Sealmaster.” The company’s website indicates that its proper name is “Seal Master Corporation,” and we use that spelling here. *See* Seal Master Corporation, <http://www.sealmaster.com/> (last visited 18 June 2014).

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but due to the fee dispute, Plaintiffs refused to authorize Temple to deliver the signed releases or dismiss the underlying lawsuit. Plaintiffs terminated their relationship with Temple and retained attorney D. Bree Lorant in early September 2011.

The fee dispute and termination of his services led Temple to file motions in the underlying lawsuit to intervene and to recover attorneys' fees and costs on 5 October 2011. On 11 October 2011, Judge Hooks entered an "Order and Notice of Hearing" stating, *inter alia*, that claims by Plaintiffs against Steris and Seal Master had "been announced as settled, but ha[d] not been dismissed as a number of issues ha[d] arisen beyond the matters" in the underlying lawsuit. The order specifically referenced the dispute regarding Temple's fees. On 26 October 2011, Plaintiffs agreed to dismiss the underlying lawsuit with prejudice. On 1 November 2011, a consent order was entered to allow dismissal of all claims against the remaining defendants as "a full and final settlement of the causes of action" had been reached in the underlying lawsuit.² However, the order did not resolve the fee dispute between Temple and Plaintiffs, and Temple's motions in the cause and to intervene remained pending.

On 20 August 2012, Plaintiffs moved to dismiss the matter or, in the alternative, to stay Temple's motions.³ On 9 and 10 October 2012, Judge Hooks, under a new commission, held a hearing on the pending motions. By order entered 7 February 2013, Judge Hooks granted Temple's motion to intervene, denied Plaintiffs' motion to dismiss or stay proceedings, and awarded Temple reimbursement of certain costs and an attorneys' fee of one-third of Plaintiffs' net recovery in the underlying lawsuit less the amount of workers' compensation lien and common costs payments previously made by Temple. From that order, Plaintiffs appeal.

Discussion

On appeal, Plaintiffs make eleven arguments: that Judge Hooks erred in (1) hearing Temple's claims without having subject matter

2. The record on appeal includes notices of voluntary dismissal with prejudice as to claims against Steris signed by each plaintiff and dated 2 November 2011. Notices of voluntary dismissal with prejudice as to Seal Master signed by each plaintiff are also included in the record. However, although the notices as to Seal Master are signed by Temple, they do not bear a file stamp from the superior court.

3. On 17 August 2012, Plaintiffs filed a separate civil action in Orange County Superior Court against Temple, asserting claims for constructive fraud, breach of fiduciary duty, duress and undue influence, negligent infliction of emotional distress, and declaratory relief. That action was dismissed without prejudice on 4 November 2013.

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jurisdiction, (2) asserting authority over Plaintiffs without having personal jurisdiction, (3) asserting authority over Plaintiffs' settlement funds without having jurisdiction, (4) hearing and ruling on Temple's claims which should have been asserted in a separate action, (5) conducting a bench trial that deprived Plaintiffs of their due process rights, right of immediate appellate review, and a fair hearing on the merits, (6) finding Temple to be a real party in interest in the underlying action, (7) granting Temple's motion to intervene, (8) awarding Temple fees and costs in violation of public policy, (9) awarding Temple fees and costs in violation of the North Carolina Rules of Professional Conduct, (10) awarding Temple fees and costs without legal authority, and (11) reaching conclusions of law that are not supported by the court's findings of fact. We affirm.

I. Jurisdiction

[1] In Plaintiffs' first four arguments, they contend that Judge Hooks erred in hearing Temple's claims without having subject matter jurisdiction, personal jurisdiction over Plaintiffs, or jurisdiction over Plaintiffs' settlement funds, and assert that Temple was required to bring his claims for costs and fees against Plaintiffs in a separate action. Because these arguments are related, we consider them together and reject each contention.

Whether a trial court has subject[]matter jurisdiction is a question of law, reviewed *de novo* on appeal. Subject[]matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject[]matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. Thus the trial court's subject[]matter jurisdiction may be challenged at any stage of the proceedings.

McKoy v. McKoy, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citations and internal quotation marks omitted; italics added).

Plaintiffs cite *In re Transportation of Juveniles* for the proposition that Judge Hooks had subject matter jurisdiction only over the issues raised in Plaintiffs' complaint which they contend did not include Temple's alleged entitlement to fees for his services. 102 N.C. App. 806,

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808, 403 S.E.2d 557, 558 (1991) (“A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, only if it is presented in the form of a proper pleading. Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.”) (citation omitted). We find that case easily distinguishable.

There, a district court judge “entered an order [regarding who would transport juveniles in secure custody to and from court], *ex mero motu* and without an action or proceeding having been filed.” *Id.* at 807, 403 S.E.2d at 558. We vacated the order because, “without an action pending before it, the district court was without jurisdiction to enter an order.” *Id.* at 808, 403 S.E.2d at 559. Here, in contrast, there *was* an action pending before Judge Hooks, to wit, the underlying lawsuit. As Judge Hooks noted in his order filed 7 February 2013, due to the dispute between Plaintiffs and Temple over Temple’s costs and fees, the trial court was “unable to have final dismissals entered” after Plaintiffs and the remaining defendants reached a settlement. The November 2011 consent order providing for final dismissal of all pending claims between Plaintiffs and the remaining defendants pursuant to the mediated settlement placed the resulting settlement funds with the Clerk of Superior Court in Brunswick County pending resolution of the dispute over Temple’s costs and fees.

For the same reason, we also reject Plaintiffs’ assertions that, once they agreed to dismiss with prejudice their remaining claims in the underlying lawsuit, (1) Judge Hooks’s “authority over this matter came to an end and he had no ability to keep the action alive beyond its natural life[.]” (2) Judge Hooks lacked jurisdiction over Plaintiffs or the settlement funds, and (3) Temple was required to bring any claims to recover his costs and fees in a separate action. As stated above, the consent order explicitly noted that the matter of Temple’s costs and fees had been raised in the underlying lawsuit and remained pending after release of the settlement funds to the Clerk.

Further, the trial court here followed the procedures this Court approved in a remarkably similar case, *Guess v. Parrott*, 160 N.C. App. 325, 585 S.E.2d 464 (2003). That appeal arose

out of a dispute between attorneys for the firms of appellant Lloyd T. Kelso & Associates and appellee Melrose, Seago & Lay, P.A., as to entitlement to attorneys’ fees

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stemming from the underlying case. The underlying case involved an automobile accident . . . in which [the] plaintiff Johnny Robert Guess, Jr., was injured when his vehicle collided with a tractor-trailer driven by [the] defendant Terry Anthony Parrott.

Shortly after the accident, [the] plaintiff's father and brother . . . contacted the appellee law firm of Melrose, Seago & Lay, P.A., and made arrangements with Randal Seago to represent [the] plaintiff. [The] plaintiff and Randal Seago entered into a contingency fee agreement in which [the] plaintiff promised to pay appellee one-third of any recovery. Further, [the] plaintiff would reimburse appellee for expenses and costs advanced by it.

Mr. Seago went about the task of representing [the] plaintiff. He filed a complaint The parties negotiated at mediation, [but] a settlement could not be reached Therefore, this matter went to trial . . . [with] a mistrial [eventually] declared.

Following the unsuccessful trial, Seago and other attorneys at appellee law firm were involved in negotiations with their client, [the] plaintiff, and [the] defendants. . . .

[The p]laintiff became dissatisfied with the representation provided to him by appellee law firm and informed them of such. Acceding to [the] plaintiff's wishes, appellee filed a motion to withdraw [which was granted]. . . .

Thereafter, [the] plaintiff secured the services of appellant Lloyd Kelso of Lloyd T. Kelso & Associates. [The p]laintiff entered into a contingency fee agreement with Kelso, promising to pay 35% of the amount recovered. . . .

The parties were ordered into mediation and eventually settled [the] plaintiff's case The attorneys' fees issue was not resolved in mediation.

Id. at 326-27, 585 S.E.2d at 465-66. The "appellee filed a motion [in the underlying case] requesting a portion of the attorneys' fees . . ." *Id.* at 327, 585 S.E.2d at 466. Following a bench trial, the trial court entered an order awarding (1) costs to each law firm, (2) "the reasonable value of its services in *quantum meruit* . . . from the contingency fee funds generated by the successful settlement" to appellee, and (3) "the remaining

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funds from the generated fee” to appellant.⁴ *Id.* at 329, 585 S.E.2d at 467 (italics added). On appeal, appellant argued, *inter alia*, that appellee’s motion had failed to state a claim upon which relief could be granted and that the trial court erred in resolving the fee dispute via a bench trial rather than before a jury. *Id.*

This Court held that “a claim by an attorney who has provided legal service pursuant to a contingency fee agreement and then [been] fired has a viable claim in North Carolina in *quantum meruit* against the former client or its subsequent representative” and that the filing of a motion in the underlying action, as Temple did here, was a proper procedure for asserting such a claim. *Id.* at 331, 585 S.E.2d at 468 (italics added). We further concluded that

[t]he apportionment of attorneys’ fees among the various lawyers who have represented a party has not been regulated by statute and is therefore within the province of the trial court. Accordingly, appellant had no right to have the reasonable value of appellee’s services determined by a jury, as this issue is committed to the sound discretion of the trial court.

Id. at 334, 585 S.E.2d at 470. Indeed, the Guess court observed that the trial judge in the underlying matter is “in the best position to make the determination of ability and skill of the parties, as well as to the difficulty of the case.” *Id.* at 337, 585 S.E.2d at 472.

We see no meaningful distinction between the circumstances in *Guess* and those presented here.⁵ As in *Guess*, the dismissed attorney filed a motion in the underlying action seeking to recover fees in *quantum meruit*, and the trial court conducted a bench trial to resolve the dispute. Accordingly, we overrule Plaintiffs’ arguments regarding

4. “[T]he theory of ‘*quantum meruit*,’ an equitable remedy, . . . is defined by Black’s Law Dictionary to mean ‘as much as deserved.’” *Id.* at 332, 585 S.E.2d at 469 (italics added). “*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment.” *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998).

5. We are not persuaded by Plaintiffs’ suggestion that the holding in *Guess* does not apply here because Plaintiffs had not entered into a *written* contract for Temple’s legal services. It is well-established that “recovery in *quantum meruit* is appropriate only where an implied contract exists, and that, where an express contract concerning the same subject matter is found, no contract will be implied.” *Carolantic Realty, Inc. v. Matco Group, Inc.*, 151 N.C. App. 464, 471, 566 S.E.2d 134, 139 (2002) (citation and internal quotation marks omitted). Here, it was the very lack of a written agreement which led to the dispute over Temple’s fees, leaving Plaintiffs and Temple with nothing but an implied contract

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Judge Hooks's jurisdiction over the issue of Temple's fees, over Plaintiffs, and over the settlement funds, and we reaffirm that an attorney may properly bring a claim for fees in *quantum meruit* against a former client by the filing of a motion in the underlying action to be resolved by the trial court via a bench trial.

II. Intervention

[2] Plaintiffs also argue that the trial court erred in various ways in its handling of Temple's motion to intervene: that (1) the trial court was required to rule on the motion to intervene before reaching the merits of the fee dispute, (2) the motion to intervene was untimely because it was not heard until five and one-half years after the filing of the complaint, and (3) Temple was not entitled to intervene as a matter of right.

As discussed *supra*, nothing in *Guess* indicates that a motion to intervene was filed by the appellee in that case; rather, this Court made clear that a dismissed attorney seeking legal representation costs and fees, like Temple, could pursue his claims against his former clients, like Plaintiffs, by the filing of a motion in the cause. *See id.* at 331, 585 S.E.2d at 468. Accordingly, both the motion to intervene and the allowance of that motion in the 7 February 2013 order were wholly unnecessary to permit Judge Hooks to reach and resolve the merits of Temple's motion in the cause. Thus, even assuming *arguendo* that Judge Hooks did err in ruling on the motion to intervene, any such error would be of no consequence to his resolution of the fee dispute in his 7 February 2013 order. Accordingly, we need not consider Plaintiffs' arguments regarding the motion to intervene.

III. Public Policy

[3] Plaintiffs also argue that the award of fees and costs to Temple was contrary to public policy in that the award was in violation of Rule 1.5(c) of the North Carolina Rules of Professional Conduct ("the Rules"), which provides that "[a] contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be

regarding his entitlement to a percentage of Plaintiffs' recovery. Temple's representation of Plaintiffs having been terminated prior to finalization of the settlement of the underlying lawsuit, even had there existed a valid written contingency fee contract between Temple and Plaintiffs, Temple could not have collected his contractual fee under it. Rather, he would have had to proceed in *quantum meruit*, exactly as he did here. *See Guess*, 160 N.C. App. at 332-33, 585 S.E.2d at 469 ("Under current North Carolina law, . . . an attorney, working pursuant to a contingency fee contract, who is discharged without cause by his or her client, is entitled to recover the reasonable value of his or her services [in *quantum meruit*].").

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determined, including the percentage or percentages that shall accrue to the lawyer” Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 1.5(c) (2012). We are not persuaded.

The “breach of a provision of the [Rules] is not in and of itself . . . a basis for civil liability.” *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 421, 558 S.E.2d 871, 879 (2002) (citations and internal quotation marks omitted). However, Plaintiffs contend that, because the Rules are adopted by our Supreme Court, *Beard v. The North Carolina State Bar*, 320 N.C. 126, 129-30, 357 S.E.2d 694, 696-97 (1987), they constitute a statement of public policy. In turn, Plaintiffs contend that to award Temple costs and fees in *quantum meruit* violates the public policy requiring that contingency fees be in writing as stated in Rule 1.5(c). See, e.g., *Canstler v. Penland*, 125 N.C. 578, 579-80, 34 S.E. 683, 683-84 (1899) (holding that a contract which violates public policy is void and unenforceable).

However, the plain language of the Rules makes clear that the

[v]iolation of a Rule should not give rise itself to a cause of action against a lawyer *nor should it create any presumption in such a case that a legal duty has been breached.* In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy The [R]ules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. *Furthermore, the purpose of the Rules can be subverted when they are invoked by [the] opposing parties as procedural weapons. . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a Rule.*

Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 0.2[7] (emphasis added). Indeed, the comments to Rule 1.5 itself explicitly provide that a trial court’s “determination of the merit of the petition or the claim [for attorney costs and fees] is reached by an application of law to fact and *not by the application of this Rule.*” Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 1.5, Comment 12 (emphasis added).

Plaintiffs cite several cases from this State in support of the proposition that

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there can be no recovery here on *quantum meruit* or otherwise. *Thompson v. Thompson*, 313 N.C. 313, 314-15, 328 S.E.2d 288, 290 (1985) (if there can be no recovery on a contract because of its repugnance to public policy, there can be no recovery on *quantum meruit*); *Richardson v. Bank of Am.*, N.A. 182 N.C. App. 531, 563, 643 S.E.2d 410, 430 (2007) (same); *In Re: Cooper*, 81 N.C. App. 27, 41, 344 S.E.2d 27, 36 (1986) (same); *Townsend v. Harris*, 102 N.C. App. 131, 132, 401 S.E.2d 132 (1991).

We do not find Plaintiffs' arguments to have merit.

We note that each of the cases cited by Plaintiffs concerns violations of public policy regarding the content of contracts rather than their form. See *Thompson*, 313 N.C. at 314, 328 S.E.2d at 290 (noting in *dicta* that a "contingent fee contract for legal services to be rendered in connection with matters arising out of the domestic difficulties between [a husband and wife] was void and unenforceable exclusively by virtue of the fact that it violated the public policy of this State"); *Townsend*, 102 N.C. App. at 132, 401 S.E.2d at 133 (same); *In Re: Cooper*, 81 N.C. App. at 29, 344 S.E.2d at 29 ("[A]lthough a contingent-fee contract in a divorce, alimony, or child support proceeding is void, . . . a separate contingent-fee contract in an equitable distribution proceeding may be fully enforceable.") (citation omitted); *Richardson*, 182 N.C. App. at 563, 643 S.E.2d at 430 (noting that "the sale of [single-premium credit insurance] with loans greater than fifteen years [i]s void as against public policy").

As for *Thompson*, the primary case cited and relied upon by Plaintiffs as "controlling" on the outcome of this appeal, the only issue actually decided by our Supreme Court in that opinion was whether an order allowing intervention can be upheld when the underlying contract in the case has been declared void and unenforceable:

The Court of Appeals held that the contingent fee contract for legal services to be rendered in connection with matters arising out of the domestic difficulties between Ms. Thompson and her husband was void and unenforceable exclusively by virtue of the fact that it violated the public policy of this State. Review of that decision has not been sought and therefore the validity of that decision is not before us.

The opinion of the Court of Appeals on that point is the law of this case as it now stands before us. The contract being void, intervenors had no interest in the property or

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the transaction that was the subject of Ms. Thompson's suit. There was, therefore, no basis for the order allowing intervention. The Court of Appeals should have, therefore, vacated the order allowing intervention and dismissed the intervenors from that suit. It erred in not doing so.

Although in view of our disposition of the case a decision on the point is not necessary, we note that it is generally held that if there can be no recovery on an express contract because of its repugnance to public policy, there can be no recovery on quantum meruit.

The opinion of the Court of Appeals remanding the case for determination of the reasonable value of the services rendered prior to 16 February 1981, the date the attorneys were discharged, is reversed. The case is remanded to the Court of Appeals for remand to the District Court of Henderson County for an order vacating the order allowing intervention and for the entry of an order dismissing the action filed by the intervenors against Ms. Thompson.

313 N.C. at 314-15, 328 S.E.2d at 290 (citations omitted; emphasis added). Thus, as the Supreme Court explicitly acknowledged, its observations regarding *quantum meruit* were purely *dicta*. *Id.* Plainly, then, *Thompson* is not controlling on that point.

In the opinion of this Court which was reversed the Supreme Court, wherein we considered as a matter of first impression whether contingent fees in domestic cases violated public policy, several policy considerations were cited, including "(1) the recognition that these contracts tend to promote divorce and (2) the lack of need for such contracts under modern domestic relations law [which provide adequate mechanisms for recovery of attorneys' fees by dependent spouses]." *Thompson v. Thompson*, 70 N.C. App. 147, 155, 319 S.E.2d 315, 320 (1984).⁶ Of course, neither of these policy considerations is implicated here, and as discussed *supra*, the Rules explicitly state they are not intended to resolve disputed attorneys' fees.

6. In an unfortunate reflection of the paternalism of the times, this Court also noted a third public policy which domestic contingent fee contracts would violate:

Wives contemplating divorce are often distraught and without experience in negotiating contracts. Should contingent fee contracts between them and the attorneys they employ under such conditions become the usual fee arrangement, charges of overreaching and undue influence will be all too frequent. The public, the legal profession, and the bench would

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On the other hand, case law from this Court and our Supreme Court makes clear that “an agent or attorney, [even] in the absence of a special contract, is entitled to recover the amount that is reasonable and customary for work of like kind, performed under like conditions and circumstances.” *Forester v. Betts*, 179 N.C. 681, 682, 103 S.E. 209, 209 (1920); *see also Williams v. Randolph*, 94 N.C. App. 413, 380 S.E.2d 553 (1989) (holding that an attorney could recover a reasonable fee even though the attorney and client had no written or oral contingency fee agreement). Indeed, the fact that an agreement for legal representation was determined “to be in violation of the Rules of Professional Conduct and unenforceable is of no consequence” where an attorney’s right of recovery arises in *quantum meruit*, because the trial court’s award of fees is based “upon the reasonable value of [the attorney’s] services” and not upon the failed agreement. *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, __ N.C. App. __, __, 730 S.E.2d 763, 766 (2012). We can find no meaningful distinction between the circumstances presented in this appeal and those in *Crumley & Assocs., P.C.*, a case which Plaintiffs fail to cite, let alone distinguish.

In sum, the Rules, precedent from our Supreme Court, and decisions by previous panels of this Court all reject the argument made by Plaintiffs here. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”). Accordingly, Plaintiffs’ argument is overruled.

IV. Mathematical Errors

[4] In their final argument, Plaintiffs contend that conclusion of law 5 of the 7 February 2013 order, stating the total amount of Temple’s petitioned-for costs which it was disallowing, is not supported by finding of fact 46, which describes certain costs charged to Temple as a sanction

all suffer. We believe all will benefit by maintaining the present public policy of not enforcing such contracts no matter how freely and fairly entered into and how reasonable may be the fee thereby produced. The wise discretion of capable and experienced trial judges (aided by the evidence placed before them by the parties prior to the time the court fixes the fee to be paid by the husband) can be relied upon to assure every attorney an adequate fee and thus assure every wife adequate representation.

Id. at 156, 319 S.E.2d at 321 (citation and internal quotation marks omitted). Needless to say, the stereotypes and assumptions which underlie this supposed justification can no longer be considered the public policy of our State.

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for his actions during discovery. However, a careful reading of Plaintiffs' argument and the record before us reveals that Plaintiffs are actually contending that the court abused its discretion in determining the sanction to impose. We disagree.

It is well-settled that Rule 37 [of the North Carolina Rules of Civil Procedure] allowing the trial court to impose sanctions is flexible, and a broad discretion must be given to the trial judge with regard to sanctions. Our Supreme Court has stated that a ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

Rose v. Isenhour Brick & Tile Co., 120 N.C. App. 235, 240, 461 S.E.2d 782, 786 (1995) (citations, internal quotation marks, and some brackets omitted), *affirmed*, 344 N.C. 153, 472 S.E.2d 774 (1996).

At the hearing on Temple's motion in the cause, the trial court asked Temple about an incident during discovery when Temple failed to timely disclose a change in certain experts he intended to call. As a result, the trial court had sanctioned Temple by requiring that he pay the costs of deposing the newly disclosed witnesses rather than shifting those costs to Plaintiffs. At the motion hearing, Temple acknowledged the sanction, and, when the court asked Temple what the amount of the sanction was, Temple responded, "[§]28,000."

Later during the hearing, the following exchange occurred between Temple and one of his attorneys:

Q[.] Now, did you undertake to prepare separate schedules to identify those deposition expenses that were incurred for the deposition of the plaintiffs' experts that Judge Hooks ordered be borne by the Temple Law Firm?

A[.] Yes.

....

Q[.] I show you two separate exhibits, [38] and [39]. Look at those and tell us what those are, please.

A[.] Exhibit Number [38] lists out the plaintiff expert deposition expenses of fees, transcripts, and videographer expenses. And [39] lists out their plaintiff expert deposition travel expenses.

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Q[.] Okay. So [38] includes both the deposition testimony time as well as the deposition transcript and video charges, is that correct, for each of those plaintiff experts that the Temple Law Firm was ordered to pay for; is that correct?

A[.] Yes, that's my understanding.

Q[.] Okay. And then Exhibit [39] represents the travel — well, tell us what [39] represents.

A[.] It represents the expenses that the experts incurred to travel to the depositions listed on the chart.

Q[.] Okay. And so what are the total expenses for the experts, their deposition testimony and their transcripts and videos, as reflected on Exhibit [38]?

A[.] \$21,686.05.

Q[.] Okay. And what are the total travel expenses incurred by those experts to give those depositions, as reflected on Exhibit [39]?

A[.] \$6,630.75.

As Plaintiffs note, the total of the expenses listed in the two exhibits is \$28,316.80, an amount quite close to the figure Temple himself provided in response to the court's question early in the hearing. However, in finding of fact 46 of the 7 February 2013 order, the trial court disallowed only a portion of that total amount:

46. As a result of the manner in which [P]laintiffs' counsel disclosed and then changed experts, the [trial c]ourt as a sanction required the costs of deposing newly disclosed experts (by Plaintiffs) be paid by [P]laintiffs['] counsel. Those costs were as follows:

\$ 750.00: Cynthia Wilhelm Deposition fee

\$ 2,000.00: Ward Zimmerman Deposition fee

\$ 2,800.00: Fred Hetzel Deposition fee 8/26/10

\$ 2,800.00: Fred Hetzel Deposition fee 11/3/[]10

\$ 3,500.00: Fred Hetzel Deposition fee 11/9/10

\$ 755.33: Ward Zimmerman Deposition related charges[]

\$ 1,364.67: Fred Hetzel deposition expenses

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\$ 986.41: Jim Dobbs Depo travel expenses

\$ 543.84: Jim Dobbs Depo travel expenses

Total: \$15,500.25

As it was always the intent of the [trial c]ourt that counsel bear this expense, it should not be allowed to be shifted to [P]laintiffs.

As noted *supra*, “broad discretion must be given to the trial judge with regard to sanctions” and such a determination will not be upset absent “a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* While Temple’s testimony and exhibits 38 and 39 reflected costs of approximately \$28,000 connected with the newly disclosed experts, the trial court itself never stated the exact amount of the expenses it planned to shift to Temple as a sanction. After reviewing the exhibits, the court, in its discretion, apparently decided that only some of those costs would be borne by Temple. Given the specificity of finding of fact 46 in breaking down and listing the specific expenses to be included in the sanction, we see no abuse of the trial court’s discretion. We explicitly reject Plaintiffs’ assertion that the trial court was required to provide an “explanation as to why the additional \$12,816.55 [was] not included.” Finding of fact 46 contains an entirely sufficient explanation of the court’s decision to sanction Temple. This argument is overruled.

The 7 February 2013 order is

AFFIRMED.

Judges ERVIN and McCULLOUGH concur.

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SRS ARLINGTON OFFICES 1, LLC, SRS ARLINGTON OFFICES 2, LLC, SRS ARLINGTON OFFICES 3, LLC, SRS ARLINGTON OFFICES 4, LLC, SRS ARLINGTON OFFICES 5, LLC, SRS ARLINGTON OFFICES 6, LLC, SRS ARLINGTON OFFICES 7, LLC, SRS ARLINGTON OFFICES 8, LLC, SRS ARLINGTON OFFICES 9, LLC, SRS ARLINGTON OFFICES 10, LLC, SRS ARLINGTON OFFICES 11, LLC, SRS ARLINGTON OFFICES 12, LLC, AND SRS ARLINGTON OFFICES, LLC, PLAINTIFFS

v.

ARLINGTON CONDOMINIUM OWNERS ASSOCIATION, INC. AND ARLINGTON COMMERCIAL HOLDINGS, LLC, AND JAMES J. GROSS, DEFENDANTS

No. COA13-808

Filed 1 July 2014

1. Associations—homeowners—standing

A homeowner's association (ACO) in a complex that also included a commercial building, an office building, and a parking garage, had standing to bring a claim for monetary damages on behalf of its members where the service contract between the owner of the office building (SRS) and owner of the commercial building (ACH) harmed ACO by depriving it of payment for its services. Furthermore, ACO had standing pursuant to N.C.G.S. § 47C-3-102(a) (4) as ACO was defending matters affecting its condominiums.

2. Damages and Remedies—basis—unjust enrichment—not compensatory

Although the owner of a commercial building (ACH) contended the trial court erred by granting summary judgment on claims for monetary relief by a homeowners association (ACO) because ACO was not a party to the services agreement or parking deck lease between the owners of an office building (SRS) and ACH and could not demonstrate damages, the monetary relief granted by the trial court was based on restitution for unjust enrichment rather than on compensatory damages.

3. Unjust Enrichment—damages—stipulated payments received

The trial court did not err by awarding restitution of \$101,544.50 based on quantum meruit in an action involving a residential tower, a commercial building, an office building, and a parking garage where the court found that \$101,544.50 was stipulated by the parties to be the total amount of payments that the commercial building owners (ACH) received from the office building owners (SRS) from 4 June 2008 to 31 December 2011.

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4. Compromise and Settlement—subsequent claim—different basis

A settlement agreement between a homeowner's association (ACO) and the owner of an office building (SRS) in a complex that also included a commercial building and a parking garage did not bar subsequent claims against the owner of the commercial building (ACH) under election of remedies. ACO sought consistent remedies, based on quantum meruit, to force all parties to disgorge ill-gotten profits, not compensatory damages.

5. Damages and Remedies—punitive—waiver of claim

A homeowners association (ACO) waived its claim for punitive damages by clearly stating to the trial court several times that it was not asking for punitive damages and acknowledging that it lacked sufficient evidence to bring a claim for punitive damages.

Cross-appeals by defendants from order entered 15 February 2013 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2014.

Katten Muchin Rosenman LLP, by Richard L. Farley, Rebecca K. Lindahl, and Meghan D. Engle, for defendant-appellee Arlington Condominium Owners Association, Inc.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant-appellants Arlington Commercial Holdings, LLC, and James J. Gross.

BRYANT, Judge.

A homeowners' association has standing to bring a claim on behalf of its members. A claim for unjust enrichment/*quantum meruit* is a claim for restitution which seeks to force a party to disgorge its ill-gotten profits. Where a party brings claims for restitution, the doctrine of election of remedies is not applicable. Summary judgment as to a claim is appropriate where a party has abandoned a claim.

The Arlington Condominium, completed on 28 January 2003, is comprised of three structures: a multi-level parking garage, a residential condominium tower, and a commercial building housing retail shops and offices. A second, separate three-story office building stands adjacent to the Arlington Condominium; both buildings share the multi-level parking garage. Defendant-appellant Arlington Commercial Holdings,

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LLC (“ACH”), currently owns the commercial building that is part of the Arlington Condominium. ACH also previously owned the separate three-story office building until it was sold to plaintiffs SRS Arlington Office, 1, LLC, *et al.* (“SRS”), in 2008.

The residential tower is maintained by defendant-appellee Arlington Condominium Owners Association, Inc. (“ACO”). ACO, acting in the usual manner of a homeowners’ association, collects dues and pays for the common expenses of the residential tower which includes maintenance of the garage. ACO also provides services including garage and common area maintenance, landscaping, and utilities to both of the commercial office buildings.

When ACH sold the separate three-story office building to SRS in 2008, SRS entered into a service agreement whereby ACH would provide services such as building maintenance, utilities, etc., to SRS. Also in 2008, SRS and ACH entered into a parking lease which permitted SRS limited use of certain spaces within the multi-level parking garage; ACO was not a party to either agreement. From 2008 to 2011, ACH received payment pursuant to the parking lease and services agreement with SRS for maintenance of the garage and common areas, landscaping, utilities, etc. However, the services, including maintenance of the garage and other areas, were actually provided by ACO, and ACO never received compensation from ACH or SRS.

In May 2010, SRS filed a complaint seeking determination of the validity and enforcement of the parking garage lease between SRS and ACH. Thereafter, SRS filed an amended complaint seeking enforcement of the services and utilities agreement between SRS and ACH, in addition to enforcement of the parking garage lease. SRS also filed a trespass upon easement claim against ACO.

ACO asserted counterclaims against SRS for declaratory judgment, *quantum meruit*, and trespass, and asserted cross-claims against ACH for *quantum meruit* in the alternative. ACO also filed a motion for summary judgment against SRS. ACO then amended its complaint, counterclaims, and cross-claims, adding James J. Gross (“Gross”) as a cross-defendant, and asserting counterclaims for constructive fraud and breach of fiduciary duty against Gross.¹

1. James Gross was the developer of the Arlington Condominium and three-story office building, member and manager of ACH, and president of ACO’s board of directors until 2008. Gross negotiated the sale of the three-story office building on behalf of ACH in June 2008.

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On 22 November 2011, SRS and ACO entered into a settlement agreement which “settled all claims” between these two parties. The settlement agreement was enforced by order of the trial court entered 22 August 2012. Meanwhile, both ACH and ACO filed motions for summary judgment against each other.

On 29 October 2012, the trial court heard arguments concerning ACO’s and ACH’s motions for summary judgment. In an order issued 15 February 2013, the trial court granted Gross’s motion for summary judgment as to punitive damages but denied summary judgment as to all remaining claims. The trial court granted ACO’s motion for summary judgment dismissing all of ACH’s claims except claim five regarding ACO’s parking garage easement which was denied in part and granted in part. The trial court, after concluding that ACH was unjustly enriched due to payments received under the services and utilities agreement, and that Gross breached his fiduciary duty to ACO by causing SRS and ACH to enter into the agreement, entered judgment against ACH and Gross, jointly and severally, for \$101,544.50. ACO, ACH, and Gross appeal.²

On appeal, ACH alleges the trial court erred in granting summary judgment to ACO because: (I) ACO lacked standing to bring a claim for monetary damages; (II) ACO failed to demonstrate any damages; and (III) ACO’s election of remedies against SRS barred ACO’s subsequent claims against ACH. ACH further argues that (IV) the trial court erred by not reducing ACO’s judgment. On cross-appeal, ACO argues that the trial court erred in granting summary judgment to Gross as to punitive damages.

*ACH and Gross’s Appeal**I.*

[1] ACH³ argues the trial court erred in granting summary judgment to ACO because ACO lacked standing to bring a claim for monetary damages on behalf of its members. We disagree.

As all claims on appeal presented by ACO and ACH concern the trial court’s granting or denial of motions for summary judgment, this Court reviews a motion for summary judgment *de novo*. See *Falk Integrated*

2. SRS is not a party to this appeal.

3. For ease of reading we use ACH to represent the joint appeal of ACH and Gross.

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Techs., Inc. v. Stack, 132 N.C. App. 807, 809, 513 S.E.2d 572, 573-74 (1999) (citations omitted). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

“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, 574 S.E.2d 55, 57 (2002) (citations omitted). To have standing, a party must be a “real party in interest.” See *Energy Investors Fund*, 351 N.C. at 337, 525 S.E.2d at 445.

In its argument, ACH specifically contends that ACO lacks standing because ACO has not been harmed by the actions of ACH and, therefore, the condominium residents, rather than ACO, are the real parties in interest. An association like ACO 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). North Carolina General Statutes, section 47C-3-102, provides that a condominium owner’s association may “[i]nstitute, defend, or intervene in its own name in litigation or administrative proceedings on matters affecting the condominium[.]” N.C. Gen. Stat. § 47C-3-102(a)(4) (2013). Moreover, this Court has held that a property owner’s association has standing to sue where the association’s inability to collect assessments harmed its ability to carry out its duties as set forth by its declaration of covenants. See *Indian Rock Ass’n, Inc. v. Ball*, 167 N.C. App. 648, 606 S.E.2d 179 (2004); see also *Federal Point Yacht Club Ass’n, Inc. v. Moore*, ___ N.C. App. ___, ___ S.E.2d ___ (April 1, 2014) (No. COA13-681) (holding that a homeowner’s association had standing as a corporate entity to bring suit against a defendant who repeatedly violated the association’s covenants).

Here, the evidence indicated that the services agreement between SRS and ACH harmed ACO by depriving ACO of payment for services which ACO provided to SRS. As such, the loss of payment for services rendered has injured ACO and, thus, permits standing.

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Furthermore, we note that ACO has standing pursuant to N.C.G.S. § 47C-3-102(a)(4)⁴ as ACO is defending matters affecting its condominiums. ACH's argument as to standing is overruled.

II.

[2] ACH next argues the trial court erred in awarding summary judgment to ACO on ACO's claim for monetary damages because ACO failed to demonstrate damages. We disagree.

In its motion for summary judgment, ACO stated that:

4. [ACO] provided, and ACH has accepted, services and utilities to the office building that is adjacent to the Condominium (the "Office Building") nongratuitously and without payment, and SRS has been unjustly enriched thereby[.]

...

6. Gross breached a fiduciary duty to the [condominium] unit owners and engaged in self-dealing during his term as President and member of the board of directors of [ACO].

The trial court, in its conclusions of law regarding ACO's motion for summary judgment, noted the following:

6. There is no dispute of material fact with respect to [ACO's] Second Crossclaim against ACH or its Fifth Crossclaim against Gross, and the Court finds as a matter of law that (a) ACH was unjustly enriched by reason of the payments received by it under the Services and Utilities Agreement and (b) Gross violated his fiduciary duties to [ACO] by causing SRS and ACH to enter into the Services and Utilities Agreement, and summary judgment in favor of [ACO], as non-moving party, is appropriate. Accordingly, the Court finds that [ACO] is entitled to judgment as a matter of law on its Second Claim – Quantum Meruit claim against ACH and on its Fifth Claim – Breach of Fiduciary Duty against Gross in the amount of \$101,544.50, which sum was stipulated to by the parties as the total amount of

4. "Unless the declaration expressly provides to the contrary, the [homeowners] association, even if unincorporated, may: . . . [i]nstitute, defend, or intervene in its own name in litigation or administrative proceedings on matters affecting the condominium[.]" N.C.G.S. § 47C-3-102(a)(4) (2013).

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payments that ACH received from [SRS] from the period June 4, 2008 to December 31, 2011, without offset.

ACH contends the trial court erred in granting summary judgment on ACO's claims for monetary relief because ACO was not a party to the services agreement or parking deck lease between SRS and ACH and, therefore, ACO cannot demonstrate damages. We note for the record that the monetary relief granted by the trial court was based not on proof of compensatory damages but restitution based on unjust enrichment. Therefore, we do not further address ACH's arguments that attempt to challenge an award of compensatory damages.

[3] "*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy . . ." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414-15 (1998) (citations omitted).

[R]estitution . . . is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses.

Booher v. Frue, 86 N.C. App. 390, 393-94, 358 S.E.2d 127, 129 (1987) (citations and quotations omitted).

Here, the court found that the sum of \$101,544.50 was stipulated by the parties to be the total amount of payments ACH received from SRS from 4 June 2008 to 31 December 2011. Therefore, because ACH was unjustly enriched by the payments it received from SRS pursuant to the services and utilities agreement, the trial court did not err in awarding restitution in the amount of \$101,544.50 based on *quantum meruit*. ACH's argument is overruled.

III.

[4] ACH next contends the trial court erred in granting ACO's motion for summary judgment because ACO's settlement agreement with SRS barred ACO's subsequent claims against ACH based on the doctrine of election of remedies. We disagree.

The whole doctrine of election [of remedies] is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other.

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But the principle does not apply to co-existing and consistent remedies.

Richardson v. Richardson, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964) (citation and quotations omitted).

A plaintiff is deemed to have made an election of remedies, and therefore estopped from suing a second defendant, only if he has sought and obtained final judgment against a first defendant and the remedy granted in the first judgment is repugnant or inconsistent with the remedy sought in the second action. The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong. One is held to have made an election of remedies when one chooses with knowledge of the facts between two inconsistent remedial rights. The doctrine does not apply to co-existing and consistent remedies.

Triangle Park Chiropractic v. Battaglia, 139 N.C. App. 201, 203-04, 532 S.E.2d 833, 835 (2000) (citations and quotation omitted).

Here, ACO sought consistent remedies, based on *quantum meruit*, to force all parties – SRS, ACH, and Gross – to disgorge ill-gotten profits. On 22 November 2011, ACO settled its claims against SRS through a settlement agreement which was enforced by order of the trial court. The agreement does not appear to address compensation for services provided by ACO, as ACH and Gross assert. Instead, the settlement agreement between ACO and SRS appeared to be a global settlement as it required SRS to pay ACO a lump sum of \$125,000.00. The settlement agreement also set forth provisions for future payments by SRS to ACO for utilities, services, and parking expenses, among many other terms. All claims between ACO and SRS were extinguished by the settlement. Thereafter, ACO moved for summary judgment against ACH and Gross, alleging that ACH had been unjustly enriched and that Gross had breached his fiduciary duty by engaging in self-dealing while serving as president of ACO's board of directors.

In a 30 October 2012 hearing, the trial court found that ACH had been unjustly enriched, and that “under these circumstances [it] should find as a matter of law that [Gross] was . . . not in addition liable, but simply jointly and severally liable with ACH to the extent of those damages.” The damages referred to was the \$101,544.50 stipulated by the parties to be the amount of payments received by ACH from SRS under the services agreement from 4 June 2008 to 31 December 2011.

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ACH's contention that ACO's claim is barred by the doctrine of election of remedies is without merit, as ACO's claims sought restitution based on *quantum meruit*, not compensatory damages. "The term '*quantum meruit*' can denote both a method of measuring recovery in restitution and a substantive theory of relief in restitution." *Paul A. Whitfield, P.A. v. Gilchrist*, 126 N.C. App. 241, 244-45, 485 S.E.2d 61, 63 (1997), *rev'd on other grounds*, 348 N.C. 39, 497 S.E.2d 412.

Restitution recovery and damages recovery are based on entirely different theories. [T]he main purpose of the damages award is some rough kind of compensation for the plaintiff's loss. This is not the case with every kind of money award, only with the damages award. In this respect, restitution stands in direct contrast to the damages action. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's part. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses.

Booher, 86 N.C. App. at 393-94, 358 S.E.2d at 129 (citations and quotations omitted).

Here, ACO brought a claim for *quantum meruit* against ACH and Gross, alleging that ACH accepted non-gratuitous services from ACO without payment which unjustly enriched SRS. As such, ACO's claim was for restitution, rather than compensation; ACO sought to force ACH to "disgorge benefits that it would be unjust for [ACH] to keep." Therefore, ACO has neither sought nor obtained an impermissible double recovery based on its settlement agreement with SRS, as ACO has consistently sought restitution by seeking to force all parties to disgorge "ill-gotten profits" rather than compensation.

The trial court awarded summary judgment to ACO, finding ACH and Gross to be jointly and severally liable for the amount of \$101,544.50. This amount represented the benefits received by ACH and Gross based on their actions in this case. Therefore, the trial court did not err in awarding summary judgment to ACO on its claim against ACH and Gross. Accordingly, we need not reach ACH's fourth argument on appeal.

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ACO's Cross-Appeal

[5] On cross-appeal, ACO argues that the trial court erred in denying its motion for summary judgment as to Gross for punitive damages. We disagree.

As we review a motion for summary judgment *de novo*, we must look to see whether there is truly no genuine issue of material fact. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013) (holding that 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 not genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.”).

In the 15 February 2013 hearing, counsel for ACO raised the issue of punitive damages against Gross to the trial court:

I want to address punitive damages. Believe me, if I thought the evidence met the standard for punitive damages in Chapter 1B, I would have put that in the order, too. I'm not asking you to enter an award of punitive damages.

...

We are not asking for punitive damages. I wish we could. Because in my opinion, he needs to be punished, but that's not going to happen.

After ACH asked the trial court to note on its order that “[ACO] has announced we're waiving the claim for your damages. I'd like that in the order because I think that's important[,]” ACO responded that “I'm not saying we're waiving it. I'm saying the evidence doesn't –.” The trial court then found as a matter of law that ACO was not entitled to punitive damages against Gross:

[T]he Court also finds that there is no dispute of material fact with respect to [ACO's] claim for punitive damages against Gross and the Court finds, as a matter of law, that Gross is entitled to summary judgment in his favor with respect to the claim for punitive damages pursuant to Chapter 1D of the North Carolina General Statutes.

Where a party informs the trial court that it does not intend to pursue a particular claim, that claim is deemed abandoned. *See Shroyer v. Cnty. of Mecklenburg*, 154 N.C. App. 163, 168-69, 571 S.E.2d 849, 852 (2002) (holding that the plaintiffs had expressly abandoned a claim for negligence where the plaintiffs made statements to the trial court

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indicating that although the plaintiffs had originally brought claims for breach of contract and negligence against the defendant, “only the breach of contract claim[] will be tried in this case. Plaintiffs have elected not to pursue the negligence claim[] against [defendant].”).

We agree with the trial court’s conclusion that ACO waived its claim for punitive damages, as ACO clearly stated to the trial court several times that “[ACO is] not asking for punitive damages.” Further, we note that ACO acknowledged it lacked sufficient evidence to bring a claim for punitive damages, telling the trial court that “if [ACO] thought the evidence met the standard for punitive damages in Chapter 1B, [ACO] would have put that in the order, too.” As such, ACO waived its claim for punitive damages. Accordingly, the trial court did not err in denying ACO’s summary judgment motion as to Gross for punitive damages.

Affirmed.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA

v.

THOMAS CRAIG CAMPBELL, DEFENDANT

No. COA13-1404

Filed 1 July 2014

1. Indictment and Information—larceny—fatally flawed—failure to allege entity capable of property ownership

Defendant’s conviction for larceny was vacated where the indictment was fatally flawed because it failed to allege that Manna Baptist Church was an entity capable of owning property. Where an indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment.

2. Burglary and Unlawful Breaking or Entering—insufficient evidence—intent to commit larceny therein

The trial court erred by denying defendant’s motion to dismiss the charge of felony breaking or entering a place of worship because there was insufficient evidence of his intent to commit larceny therein. However, there was ample evidence to support a conviction

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for misdemeanor breaking or entering and the case was remanded for entry of judgment on that offense and resentencing.

3. Constitutional Law—effective assistance of counsel—failure to move to exclude evidence—not prejudicial

Defendant's argument that he received ineffective assistance of counsel in a larceny and breaking or entering a place of religious worship case was overruled. Although trial counsel failed to move in limine to exclude evidence that defendant had been arrested on an unrelated breaking or entering charge and initially failed to object to introduction of that evidence at trial, there was insufficient evidence of defendant's intent to commit larceny therein and defendant could not show prejudice from any failure of his trial counsel to object to this evidence.

Appeal by defendant from Judgment entered on or about 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County. Heard in the Court of Appeals 7 May 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Allison A. Angell, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jason Christopher Yoder, for defendant-appellant.

STROUD, Judge.

Thomas Campbell ("defendant") appeals from the judgment entered after a Cleveland County jury found him guilty of larceny and breaking or entering a place of religious worship. We vacate defendant's larceny conviction and reverse his conviction for breaking or entering a place of religious worship. We remand for entry of judgment and resentencing on misdemeanor breaking or entering.

I. Background

On 8 October 2012, defendant was indicted for breaking or entering a place of religious worship and larceny after breaking or entering. The larceny indictment alleged that on 15 August 2012 defendant "willfully and feloniously did steal, take, and carry away a music receiver, microphones, and sounds [sic] system wires, the personal property of Andy Stephens and Manna Baptist Church, pursuant to a breaking or entering in violation of N.C.G.S. 14-54.1(a)." Defendant pled not guilty and proceeded to jury trial.

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At trial, the State's evidence tended to show that Pastor Andy Stephens of Manna Baptist Church, located on Burke Road in Shelby, North Carolina, discovered after Sunday services on 19 August 2012 that a receiver, several microphones, and audio cords were missing. The cords were usually located at the front of the church, by the sound system, or in the baptistery changing area. It appeared that the sound system had been opened up and items inside had been moved around. Pastor Stephens found a wallet in the baptistery changing area that contained a driver's license belonging to defendant.

Pastor Stephens testified that when the church secretary arrived on Thursday morning earlier that week, she had noticed that the door was unlocked. She assumed that it had been left unlocked after Wednesday night services, which had ended around 9 p.m. Although the front door is normally locked at night, on cross-examination, Pastor Stephens admitted that the church door had been left unlocked overnight before. Pastor Stephens said that the secretary did not notice anything amiss on Thursday morning.

After Pastor Stephens realized that the audio equipment was missing he called the Cleveland County Sheriff's Office. Deputy Jordan Bowen responded to the scene. The deputy examined the premises but found no signs of forced entry. He recovered defendant's wallet from the pastor.

Investigator Jessica Woosley went to speak with defendant at the Cleveland County Detention Center, where he was being held on an unrelated breaking or entering charge. When Investigator Woosley introduced herself, defendant said, "this can't possibly be good. What have I done now that I don't remember?" Investigator Woosley read defendant his *Miranda* rights and defendant invoked his right to counsel. Investigator Woosley tried to end the interview, but defendant continued talking.

Defendant admitted that he had been to Manna Baptist Church on the night in question, but stated that he could not remember what he had done there. He explained that he had mental issues and blacked out at times. Defendant claimed to be a religious man who had been "on a spiritual journey." He said that he remembered the door to the church being open, but that he did not remember doing anything wrong.

After speaking with defendant, Investigator Woosley searched through a pawn shop database for any transactions involving items matching those missing from the church but did not find anything. The missing items were never recovered.

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At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied the motion. Defendant then elected to present evidence and testify on his own behalf. Defendant testified that he was a 51 year old man with a high school education and one semester of college. He said that on 15 August 2012, he had been asked to leave the home he was living in, so he packed his possessions in a duffel bag and left. He started walking toward a friend's house but dropped the bag in a ditch because it was too heavy to carry long-distance.

Around midnight, defendant arrived at his friend's house, but his friend's girlfriend asked him to leave, so he did. Defendant continued walking down the road until he came upon the church. He noticed that the door was cracked slightly and a "sliver of light" was emanating from within. Defendant explained that after all his walking, he was thirsty and tired, so he went into the church looking for water and sanctuary. He said that while he was inside, he got some water, prayed, and slept. He claimed that he did not intend to take anything and did not take anything when he left around daybreak.

After leaving the church, defendant began walking down the road again. He soon began having chest pains and called 911. Defendant explained that he was on a variety of medications at the time, including powerful psychotropic medication. An ambulance arrived and took him to Cleveland Memorial Hospital.

Calvin Cobb, the Emergency Medical Technician (EMT) who responded to defendant's call, also testified on defendant's behalf. Mr. Cobb said that they received a dispatch call around 6:30 a.m. When they arrived at the intersection of Burke Road and River Hill Road, they saw defendant near an open field, sitting on the back of a fire truck that had been first to respond. Defendant told Mr. Cobb that he had been wandering all night. Mr. Cobb noticed that defendant looked disheveled and worn out, and that defendant had worn through the soles of his shoes. Mr. Cobb did not see defendant carrying anything and did not find anything in his pockets.

After defendant rested his case, the State called another officer in rebuttal. The State wanted to offer his testimony regarding defendant's prior breaking or entering arrest. The trial court asked the State to explain the relevance of the prior incident. The State argued that it contradicted part of defendant's testimony regarding what happened before he got to the church, but did not elaborate on how it contradicted defendant's testimony and did not otherwise explain its relevance. The trial court excluded the rebuttal testimony under Rule 403. At the close of

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all the evidence, defendant renewed his motion to dismiss all charges, which the trial court again denied.

The jury found defendant guilty of both charges. The trial court consolidated the charges for judgment and sentenced defendant to a split sentence of 13-25 months imprisonment, suspended for 24 months of supervised probation, and an active term of 140 days in jail. Defendant gave timely written notice of appeal.

II. Larceny Indictment

[1] Defendant first argues that the larceny indictment on which he was tried was fatally defective because it “failed to allege that Manna Baptist Church was an entity capable of owning property.” We agree.

“It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (citation and quotation marks omitted). “A challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal.” *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010).

“An indictment must allege all of the essential elements of the crime sought to be charged.” *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (citation and quotation marks omitted), *disc. rev. denied*, 360 N.C. 73, 622 S.E.2d 624 (2005). “The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the owner’s consent; and (4) with the intent to permanently deprive the owner of the property.” *State v. Justice*, ___ N.C. App. ___, ___, 723 S.E.2d 798, 801 (2012) (citation, quotation marks, and brackets omitted). “[A]n indictment for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is defective.” *State v. Abbott*, ___ N.C. App. ___, ___, 720 S.E.2d 437, 440 (2011) (citation and quotation marks omitted).

Here, the indictment alleged two owners of the stolen property—Andy Stephens and Manna Baptist Church. Andy Stephens is a natural person, but the indictment does not allege that Manna Baptist Church is a legal entity capable of owning property. Failure to include such an allegation is normally fatal to the indictment. *See State v. Cathey*, 162 N.C. App. 350, 353, 590 S.E.2d 408, 410 (2004). The inclusion of Pastor Stephens as co-owner does not cure the omission here.

Where an indictment alleges two owners of the stolen property, the State must prove that each owner had at least some property interest in

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it. See *State v. Greene*, 289 N.C. 578, 585, 223 S.E.2d 365, 370 (1976) (“If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit.”); *State v. Burgess*, 74 N.C. 272, 273 (1876) (“If one is charged with stealing the property of A, it will not do to prove that he stole the joint property of A and B.”); *State v. Hill*, 79 N.C. 656, 659 (1878) (holding that where an indictment alleges multiple owners, the State must prove that there were in fact multiple owners). If one of the owners were incapable of owning property, the State necessarily would be unable to prove that both alleged owners had a property interest. Therefore, where the indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment. Consequently, the indictment here is fatally flawed and defendant’s conviction for larceny must be vacated. See *Abbott*, ___ N.C. App. at ___, 720 S.E.2d at 441.

III. Breaking or Entering a Place of Worship

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of felony breaking or entering a place of worship because there was insufficient evidence of his intent to commit larceny therein. We agree.

When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State’s favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant[’s] being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant’s guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant’s innocence.

State v. Chillo, 208 N.C. App. 541, 545, 705 S.E.2d 394, 397 (2010) (citation and quotation marks omitted).

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A person commits the felony of breaking or entering a place of worship if he “[1] wrongfully breaks or enters [2] any building that is a place of religious worship [3] with intent to commit any felony or larceny therein.” N.C. Gen. Stat. § 14-54.1(a) (2011). There are two lesser-included offenses to this charge: felony breaking or entering under N.C. Gen. Stat. § 14-54(a) (2011), which lacks the “place of religious worship” element, and misdemeanor breaking or entering under N.C. Gen. Stat. § 14-54(b) (2011), which lacks both the “place of religious worship” element and the intent element.

Defendant does not contend that the State failed to present sufficient evidence that he wrongfully entered a place of religious worship. He argues that the State failed to present sufficient evidence of intent to commit a larceny therein.

“Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.” *Chillo*, 208 N.C. App. at 546, 705 S.E.2d at 398. “The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the [building].” *State v. Brewer*, 80 N.C. App. 195, 199, 341 S.E.2d 354, 357 (1986) (citation and quotation marks omitted). “For example, the intent to commit larceny may be inferred from the fact that defendant committed larceny.” *Chillo*, 208 N.C. App. at 546, 705 S.E.2d at 398 (citation and quotation marks omitted). “Further, a defendant’s possession of stolen goods soon after the theft is a circumstance tending to show him guilty of the larceny.” *State v. Baskin*, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (citation, quotation marks, and brackets omitted), *disc. rev. denied*, 362 N.C. 475, 666 S.E.2d 648 (2008). Finally, “[i]n the absence of a showing of a lawful motive, an intent to commit larceny may be reasonably inferred from an unlawful entry.” *State v. Quilliams*, 55 N.C. App. 349, 351, 285 S.E.2d 617, 619, *cert. denied*, 305 N.C. 590, 292 S.E.2d 11 (1982); *see State v. McBryde*, 97 N.C. 393, 397, 1 S.E. 925, 927 (1887) (establishing that an inference of felonious intent may be made where a defendant breaks into a dwelling at night with “no explanatory facts or circumstances”). However, this inference may be precluded by evidence of facts or circumstances that reveal an innocent reason for the defendant’s entering into the building.¹

1. *See, e.g., State v. Cook*, 242 N.C. 700, 703, 89 S.E.2d 383, 385 (1955) (evidence sufficient to preclude inference where the defendant did not flee when discovered, explained that he was looking for a particular person, and left when requested), *State v. Moore*, 62 N.C. App. 431, 434, 303 S.E.2d 230, 232 (1983) (holding that there was sufficient evidence of innocent intent where both the State’s and defendant’s evidence showed that the defendant was coerced at knifepoint to enter), *State v. Humphries*, 82 N.C. App. 749, 751,

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The presumption, or inference as it is more properly called, is one of fact and not of law. The inference derived from [an unlawful entry] is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. Proof of [unlawful entry] by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt.

State v. Fair, 291 N.C. 171, 173, 229 S.E.2d 189, 191 (1976) (citations omitted).

Here, defendant admitted entering the church, but he explained that he entered to seek sanctuary, drink water, and pray. Defendant testified that the door to the church was unlocked when he arrived there. He stated that he saw that the door was slightly ajar and that a "sliver of light" was coming from within. He testified that he did not enter intending to steal anything and did not in fact steal anything. None of the State's evidence contradicts this testimony. Pastor Stephens testified that when the church secretary arrived on the morning of 20 August 2012, she found the front door unlocked. There were no signs of forced entry. Pastor Stephens admitted that the door could have been left unlocked accidentally after Wednesday night services, which ended around 9 p.m.

Defendant testified that he arrived at the church after 12 a.m. and set back out on the road around sunrise, but that shortly thereafter he began having chest pains and called 911. Mr. Cobb, the EMT who responded to defendant's call, testified that he was dispatched around 6:30 a.m. At the time, defendant was near an open field at the intersection of Burke Road and River Hill Road. The church is also located on Burke Road, though its distance from the intersection is not clear from the testimony. When Mr. Cobb arrived, defendant was sitting on the back of a fire truck, which had responded first. Defendant looked disheveled and worn out.

348 S.E.2d 167, 169 (1986) (holding that the evidence was sufficient to preclude inference where defendant believed house to be that of his girlfriend and nothing in the dwelling had been disturbed), *disc. rev. dismissed*, 320 N.C. 165, 357 S.E.2d 359 (1987), *State v. Lamson*, 75 N.C. App. 132, 133, 135, 330 S.E.2d 68, 68, 70 (holding that the evidence was sufficient to preclude inference where he tried to enter the house drunk and was staying at the neighboring house), *disc. rev. denied*, 314 N.C. 545, 335 S.E.2d 318 (1985); *see also*, *State v. Keitt*, 153 N.C. App. 671, 675-76, 571 S.E.2d 35, 37-38 (2002) (discussing the rebuttable *McBryde* inference and holding that evidence of intoxication alone is insufficient to rebut it), *aff'd per curiam*, 357 N.C. 155, 579 S.E.2d 250 (2003).

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He had worn through the soles of his shoes. Defendant explained to Mr. Cobb that he had been wandering all night. Mr. Cobb testified that defendant was not carrying anything and did not have anything in his pockets.

Four days later, after Sunday services, Pastor Stephens noticed that an audio receiver, some microphones, and some audio cords were missing. These items were kept at various places around the church, including by the sound system, in the front of the church, and in the baptistery changing area, where defendant's wallet was found. Investigator Woosley checked a pawn shop database, but found no reports of items matching those missing from the church. Neither the officers nor any of the church staff searched the area around the church for the missing items. The items were never recovered.

When Investigator Woosley spoke with defendant at the Cleveland County Detention Center, defendant admitted that he had been to the church, but stated that he could not remember what he had done there. Defendant explained that he was a religious man and that "he had been on a spiritual [journey]." He admitted having periodic blackouts related to his mental health issues and medications, but never admitted taking anything from the church or entering the church with intent to steal.² He said that he remembered going to the church and that the church door was open when he got there, but that he did not remember doing anything wrong once inside.

We conclude that these facts are sufficient "explanatory facts and circumstances" to preclude the *McBryde* inference. See *McBryde*, 97 N.C. at 397, 1 S.E. at 927; *Lamson*, 75 N.C. App. at 135, 330 S.E.2d at 70. Unlike in the cases finding the evidence sufficient to infer intent from the breaking or entering alone, there was evidence of innocent intent and no evidence that defendant was discovered in the church and fled from the building. Cf. *State v. Hill*, 38 N.C. App. 75, 78, 247 S.E.2d 295, 297 (1978). Instead, he called 911 from a location near the church. There was no evidence that defendant attacked occupants of the building. Cf. *State v. Accor*, 277 N.C. 65, 73, 175 S.E.2d 583, 588-89 (1970). There was no evidence that defendant entered the building in a manner consistent with criminal intent—he entered through an unlocked front door. Cf. *State v. Hedrick*, 289 N.C. 232, 236, 221 S.E.2d 350, 353 (1976)

2. Defendant did admit that he had previously broken into a residence, but there was no evidence that this offense had anything to do with the church, that it was in the same vicinity, or that it was uniquely similar to the facts here. Indeed, when the State attempted to elaborate on this other offense in rebuttal, the trial court excluded this evidence under Rule 403.

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(applying the *McBryde* presumption where the defendant pushed in a windowpane to retrieve a key, cut telephone wires, was familiar with the layout of the house, and fled when confronted); *Quilliams*, 55 N.C. App. at 351, 285 S.E.2d at 619 (concluding that there was sufficient evidence to survive a motion to dismiss where the defendant broke through a window, cut through a screen, and fled when discovered).

“Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption.” *Fair*, 291 N.C. at 173-74, 229 S.E.2d at 190 (citation and quotation marks omitted). Here, there was no evidence to contradict the innocent “facts and circumstances” offered by defendant. Therefore, the State was not entitled to rely on the *McBryde* inference to meet its burden.

Absent such an inference, we conclude that the evidence was insufficient, even taken in the light most favorable to the State, to show that defendant entered the church with intent to commit larceny. *Brewer*, 80 N.C. App. at 199, 341 S.E.2d at 357. The church was unlocked for over three hours before defendant arrived. There was no evidence of forced entry. Several hours later, when Mr. Cobb encountered defendant on the same road as the church, defendant was not carrying anything. None of the church staff noticed that the items were missing until four days later, after Sunday services. There was no evidence that defendant tried to sell the items in local pawn shops. There was no evidence that defendant touched the audio system. In fact, the State presented no evidence that showed defendant ever possessed the missing items. *Cf. Chillo*, 208 N.C. App. at 546, 705 S.E.2d at 398; *Baskin*, 190 N.C. App. at 109, 660 S.E.2d at 572.

We hold that the State failed to meet its burden as to the intent element of felonious breaking or entering a place of worship. The evidence is insufficient to support a reasonable inference that defendant entered the church with intent to commit larceny. Taken in the light most favorable to the State, the evidence here “raises no more than a suspicion of guilt.” *Chillo*, 208 N.C. App. at 545, 705 S.E.2d at 397. Therefore, the trial court erred in denying defendant’s motion to dismiss at the close of all the evidence. *See id.*

Although there was insufficient evidence to sustain a conviction for felonious breaking or entering, as defendant concedes, there was ample evidence to support a conviction for misdemeanor breaking or entering. Therefore, we remand for entry of judgment on that offense and resentencing. *See State v. Dawkins*, 305 N.C. 289, 291, 287 S.E.2d 885,

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887 (1982) (remanding for entry of judgment on misdemeanor breaking or entering where evidence was sufficient to support that offense, but not felonious intent).

IV. Ineffective Assistance of Counsel

[3] Defendant next argues that he received ineffective assistance of counsel because his trial counsel failed to move *in limine* to exclude evidence that he had been arrested on an unrelated breaking or entering charge and initially failed to object to introduction of that evidence at trial. When his trial counsel did object to the State's attempt to call a witness in rebuttal to testify regarding the other charge, the trial court sustained the objection under Rule 403.

To prevail in a claim for [ineffective assistance of counsel], a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Smith, ___ N.C. App. ___, ___, 749 S.E.2d 507, 509 (2013) (citation and quotation marks omitted).

The relevance of the objected-to evidence here relates—at very best—to the defendant's intent to commit larceny upon entering the church. Given our disposition of the breaking or entering charge, defendant cannot show prejudice from any failure of his trial counsel to object to this evidence. Therefore, he is not entitled to a new trial.

V. Conclusion

For the foregoing reasons, we conclude that the trial court was without jurisdiction to try defendant on the larceny charge and that it erred in denying defendant's motion to dismiss the felony breaking or entering charge. Because there was sufficient evidence to sustain a conviction for misdemeanor breaking or entering, we remand for entry of judgment and resentencing on that offense.

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

Judges STEPHENS and McCULLOUGH concur.

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STATE OF NORTH CAROLINA

v.

SHAWN CARLOS GODLEY

No. COA13-1337

Filed 1 July 2014

1. Constitutional Law—public trial—indecent liberties—courtroom closed during victim’s testimony

Defendant’s constitutional right to a public trial was not violated in an indecent liberties prosecution where the courtroom was closed during the victim’s testimony. While the trial court’s findings of fact were not supported by competent evidence in its original order, the trial court reevaluated the State’s motion to close the courtroom pursuant to remand instructions and made numerous supplemental findings regarding such things as the nature of the charges, the young age of the victim, the judge’s experience in that courthouse and the lack of alternatives. Those findings were sufficient to support the courtroom closure.

2. Indecent Liberties—substantial evidence—arousing or gratifying sexual desire

Defendant also argues that the trial court erred in denying his motion to dismiss the charge of indecent liberties with a child. Specifically, defendant contends that the State failed to demonstrate sufficient substantial evidence that he committed indecent liberties for the purpose of arousing or gratifying sexual desire. Testimony from the State’s witnesses coupled with the other instances of defendant’s alleged sexual misconduct that gave rise to the first-degree rape charges are sufficient evidence to infer defendant’s purpose of arousing or gratifying sexual desire.

Appeal by defendant from judgment entered 1 May 2013 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 23 April 2014.

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

William D. Spence, for defendant.

ELMORE, Judge.

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On 1 May 2013, a jury found Shawn Carlos Godley (defendant) guilty of indecent liberties with a child, and defendant pled guilty to being a habitual felon. Judge W. Russell Duke, Jr. consolidated the convictions into one judgment and sentenced defendant to 84-110 months of active imprisonment. Defendant appeals and raises as error the trial court's decision to: 1.) grant the State's motion to close the courtroom doors during the victim's testimony and 2.) deny his motion to dismiss the indecent liberties charge. After careful consideration, we hold that the trial court did not err.

I. Facts

On 26 September 2011, a twelve-year-old female (the victim) and her grandmother went to the City of Washington Police Department to report a series of four alleged sexual events between the victim and defendant. Defendant was the boyfriend of the victim's aunt and lived in the same residence as the victim during the alleged acts. The reported instances of sexual activity occurred between June and August 2011 and included kissing, fondling, masturbation, and intercourse. As a result, defendant was charged with three counts of first-degree rape of a child and taking indecent liberties with a child.

At trial, the State made an oral motion to close the courtroom doors during the testimony of its first witness, the victim. Over defendant's objection, the trial court granted the State's motion. Following the victim's testimony, the State called Detective Dean Watson of the City of Washington Police Department as a witness and subsequently presented no further evidence. Four witnesses testified for defendant: defendant's cousin, the legal assistant for defendant's attorney, and the victim's father and aunt. At the close of the State's evidence, defendant made a motion to dismiss the indecent liberties charge for insufficiency of the evidence, which was denied by the trial court. The jury returned a verdict of not guilty as to the three counts of first-degree rape but guilty of taking indecent liberties with a child.

On 30 April 2014, this Court entered an order remanding this matter to the trial court to conduct a hearing and make appropriate findings of fact and conclusions of law regarding the temporary closure of the courtroom in accordance with *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216-17, 81 L.Ed.2d 31, 39 (1984), as interpreted by this Court in *State v. Rollins (Rollins I)*, ___ N.C. App. ___, ___, 729 S.E.2d 73, 77-79 (2012). Defendant's appeal was held in abeyance pending this Court's receipt of the trial court's order containing these new findings.

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A hearing was held by the trial court on 22 May 2014. On 28 May 2014, the trial court entered an order containing findings of fact and conclusions of law as directed by this Court.

II. Analysis**a. Closing the Courtroom**

[1] Defendant argues that the trial court erred in closing the courtroom during the victim's testimony. Specifically, defendant avers that his constitutional right to a public trial was violated because the State failed to present evidence sufficient to support the trial court's decision to close the courtroom. We disagree.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))). This court reviews alleged constitutional violations *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d, 892, 897 (2007).

Pursuant to the Sixth Amendment of the United States Constitution, a criminal defendant is entitled to a "public trial." U.S. Const. amend. VI.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller, 467 U.S. at 46, 104 S.Ct. at 2215 (citations and quotations omitted). However, "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* at 45, 104 S.Ct. at 2215. In accordance with this principle, N.C. Gen.

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Stat. § 15-166 (2013) permits the exclusion of certain persons from the courtroom in cases involving rape and other sexually-based offenses:

In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

Before a trial court may allow a courtroom closure, it must comply with the rule set forth in *Waller. State v. Comeaux*, ___ N.C. App. ___, ___, 741 S.E.2d 346, 350 (2012). The State carries the burden “to present sufficient evidence, either in its case in chief or by *voir dire*, to permit the trial court to satisfy the *Waller* test[.]” *State v. Rollins (Rollins II)*, ___ N.C. App. ___, ___, 752 S.E.2d 230, 233 (2013). The trial court must balance the interests of the State with defendant’s constitutional right to a public trial through use of a four-part test: “(1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect this interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.” *Rollins I*, ___ N.C. App. at ___, 729 S.E.2d at 77 (internal quotations and citations omitted). In making its findings, “[t]he trial court’s own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court’s observations of its own courtroom.” *Rollins II*, ___ N.C. App. ___, ___, 752 S.E.2d at 235 (citation omitted). When this Court, on remand, directs a trial court to conduct a rehearing to make supplemental findings of fact and conclusions of law regarding the temporary closure of a courtroom, the trial court may base its supplemental findings of fact on evidence presented after the State’s original motion. *See id.* at ___, 752 S.E.2d at 233-34 (rejecting defendant’s contention that on remand “the trial judge ought to place himself back at that point in time in the trial when he heard the State’s initial motion, and to consider only those facts he (the trial judge) knew at the time” and acknowledging that findings can “be based upon evidence presented . . . after the ruling upon the motion [for closure]”).

Here, the State made its original oral motion to close the courtroom before any evidence had been presented, as the motion was made immediately after opening statements and before any witness testified. In support of the motion, the State presented no evidence through *voir-dire*

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or its case-in-chief but merely offered an argument and referenced the charging documents to convince the trial court to close the courtroom:

PROSECUTOR: Judge, at this time, the State is making a motion to close the courtroom to any non-essential personnel during the testimony of the next witness . . . who is alleged as the victim in the indictment. I would assert that there's a compelling interest, that given her age at the time of the offense and her age now, that the presence of non-necessary personnel would create a hardship on her and make it difficult in testifying and her testimony is essential and that it's not available to be admitted from any other source. So, for those reasons, I would ask to have non-essential personnel removed during her testimony only. . . . Judge, you know by the nature of the charges, and even though I guess it's not evidence, what you've heard from both counsel's opening statements of what the allegations are in regard to a *quasi* family relationship, and, of course, Your Honor has enough experience to know what the testimony generally is – I mean, that and it involves minor child and there's not an available alternative that I'm aware of.

Based on the above colloquy, the trial court originally made the following findings of fact:

1. The crimes alleged in the case at trial are of a sexual nature,
2. The crimes alleged in the case at trial involve an alleged victim [sic] is a minor child who is 13 years old now and crimes that took place in July and August of 2011.
3. The facts involve a relationship between the alleged victim and the defendant that are of a quasi-family nature.
4. The state contends that the evidence that would come from the minor child is not admissible by non-hearsay means from another reliable source.
5. The [d]efendant objected to any closure of the courtroom on 6th Amendment grounds of due process, fundamental fairness, and right to confront his accuser in a public trial.

While the trial court's findings of fact were not supported by competent evidence in its original order, the trial court reevaluated the State's motion to close the courtroom on 22 May 2014, pursuant to our remand instructions. The trial court made numerous supplemental findings of fact, including:

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1. The Court, prior to and during the selection of the jury and prior to the impaneling of the jury, made an extensive and exhaustive examination of the Clerk of Court's criminal file and the indictments herein and readily recognized that the crimes alleged . . . are of a sexual nature, that the alleged victim is a minor child who is 13 years of age at the time of trial and that the crimes allegedly took place in July and August of 2011, almost two years earlier.
2. [T]he right side of the Courtroom [is] occupied . . . with people charged with various misdemeanors and felonies and possibly their witnesses . . . and one reporter with the local newspaper who the Court did not recognize, and various attorneys of those persons, seated against the right wall of the Courtroom within the Bar.
3. During the calling of the case for trial and during the selection of the jury, the Court has had the opportunity to observe the alleged victim, a teenager of 13 years of age, the defendant, a man with a criminal record allowing him to be charged as an habitual felon, and those people seated on the right side of the Courtroom and the attitude and demeanor of the victim and the defendant and the general nature and character of the audience seated on the right side of the Courtroom.
4. Upon the jury being selected and . . . having been informed by the State in open court and at a bench conference, with defendant's counsel present, of the quasi-familial nature of the relationship of the defendant and the alleged victim and that the testimony of the alleged victim is essential and uncorroborated and not available from any other source and would take only the remaining one hour and 15 minutes of the Court day (all of such representations were subsequently supported by the evidence proffered by the State), and the Court having considered the demeanor of the victim, the defendant and the nature and character of the remaining audience situated on the right side of the Courtroom, the Court ordered those people who were *not* members of the defendant's family, defense counsel seated against the right hand side of the wall of the Courtroom inside the Bar, witnesses in this case, other prosecutors and not other court personnel, to temporarily leave the Courtroom[.]

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...

5. Having presided from time to time in Beaufort County Superior Court for over twenty years, the Court is well aware that a video feed or other technology that might allow remote testimony is not available . . . and no alternative method that would allow the victim to testify in front of the defendant or where the defendant would have the opportunity to view the testimony of the victim and where the jury could consider the evidence and the public could be present, is available so as for the trial to proceed in the Beaufort County Courthouse.

These supplemental findings are supported by competent evidence in light of the 1.) trial court's own observations of the criminal file, indictments, and personnel inside the courtroom; 2.) bench conference; 3.) trial court's experience in Beaufort County's courthouse; and 4.) trial court's consideration of the evidence presented during the State's case-in-chief. Moreover, the young age of the victim, nature of the charges, quasi-familial relationship with defendant, type of other persons present in the courtroom, necessity of the victim's non-hearsay testimony, limited time and scope of the courtroom closure, and lack of any reasonable alternatives to closing the courtroom are findings sufficient to support the courtroom closure. Accordingly, defendant's constitutional right to a public trial was not violated.

b. Motion to Dismiss

[2] Defendant also argues that the trial court erred in denying his motion to dismiss the charge of indecent liberties with a child. Specifically, defendant contends that the State failed to demonstrate sufficient substantial evidence that he committed indecent liberties for the purpose of arousing or gratifying sexual desire pursuant to N.C. Gen. Stat. § 14-202.1(a)(1). We disagree.

“A motion to dismiss for insufficiency of the evidence is properly denied if substantial evidence exists to show: (1) each essential element of the offense charged; and (2) that defendant is the perpetrator of such offense.” *State v. Fuller*, 166 N.C. App. 548, 554, 603 S.E.2d 569, 574 (2004) (internal citation omitted). “The trial court’s function is to test whether a reasonable inference of the defendant’s guilt of the crime charged may be drawn from the evidence. The evidence is to be considered in the light most favorable to the State.” *Id.* (internal citations and quotations omitted).

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[234 N.C. App. 562 (2014)]

The following elements are necessary to establish indecent liberties with a child under N.C. Gen. Stat. § 14-202.1(a)(1): “(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.” *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987) (internal citation omitted). “Indecent liberties are defined as such liberties as the common sense of society would regard as indecent and improper.” *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (citations and internal quotations omitted). Moreover, “[t]hat the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant’s actions.” *State v. Sims*, 216 N.C. App. 168, 171, 720 S.E.2d 398, 400 (2011) (citation and quotation omitted).

Defendant’s indecent liberties with the victim in June 2011 are illustrated by the State’s witnesses. The victim stated that while at her grandmother’s house, defendant kissed her on the mouth, told her not to tell anyone about what transpired, and continued to kiss her even after she asked him to stop. Detective Watson testified that when the victim spoke to police officers on 26 September 2011 about the sexual activity at her grandmother’s house, she indicated that defendant “made sexual advances on her while he was drunk[,]” kissed her, fondled her “under her clothing,” “touch[ed] her breasts and vagina, but did not penetrate her.” Such testimony constitutes substantial evidence of taking indecent liberties with the victim. Moreover, this testimony coupled with the other instances of defendant’s alleged sexual misconduct that gave rise to the first-degree rape charges are sufficient evidence to infer defendant’s purpose of arousing or gratifying sexual desire. *See State v. Minyard*, ___ N.C. App. ___, ___, 753 S.E.2d 176, 182-188 (2014) *appeal dismissed, disc. review denied*, 50P14, 2014 WL 1512491 (2014) (holding that the victim’s statements that the defendant used his penis to touch the victim’s buttocks and penis multiple times “provide[d] ample evidence to infer [the] [d]efendant’s purpose of obtaining sexual gratification”); *see also State v. Creech*, 128 N.C. App. 592, 599, 495 S.E.2d 752, 756-57 (1998) (holding that “the jury could reasonably conclude” that the defendant’s acts “were committed to arouse defendant’s sexual desire” where he gave the victim massages while only wearing “his underwear while [the victim] wore only his shorts[,]” and the State offered testimony “concerning [the] defendant’s similar pattern of behavior during massages with other young males”). Accordingly, the trial court did not err in denying defendant’s motion to dismiss for insufficient evidence.

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[234 N.C. App. 570 (2014)]

III. Conclusion

In sum, the trial court neither erred in granting the State's motion to close the courtroom doors during the victim's testimony nor in denying defendant's motion to dismiss the indecent liberties charge for insufficient evidence.

No error.

Judges McCULLOUGH and DAVIS concur.

STATE OF NORTH CAROLINA
v.
DOUGLAS EUGENE VEAL

No. COA13-1407

Filed 1 July 2014

Search and Seizure—reasonable suspicion—driving while impaired—tip from gas station attendant

The trial court in a prosecution for impaired driving and other offenses properly denied defendant's motion to suppress all evidence stemming from the initial stop where an attendant at a gas station called in a tip, an officer was dispatched, and defendant was arrested after failing field sobriety tests. This tip was more reliable than one from a true anonymous caller because the caller was identified as an employee of the gas station, defendant was not "seized" by the officer's approach and initial questioning, and the officer's personal observations of the odor of alcohol and an unopened container of beer made during the voluntary encounter were a sufficient basis for reasonable suspicion to support a stop.

Appeal by defendant from judgment entered 6 August 2013 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 April 2014.

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

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

STATE v. VEAL

[234 N.C. App. 570 (2014)]

McCULLOUGH, Judge.

Douglas Eugene Veal (“defendant”) appeals the order of the trial court, denying his motion to suppress evidence. For the following reasons, we affirm the order of the trial court.

I. Background

On 4 July 2011, Officer Rodney Cloer of the Asheville Police Department (“Officer Cloer”) was dispatched to a report of an intoxicated driver in a green Chevy truck at the Citistop gas station located at 760 Haywood Road. The report of an intoxicated person came through dispatch from an employee at the Citistop gas station. Dispatch reported that there was a very intoxicated male subject trying to leave the gas station in a green Chevy truck with a bed cover. Dispatch also identified the subject as an elderly white male in a white hat. Officer Cloer responded to the call and drove to the gas station and parked his car in the parking lot. He then observed defendant driving his green truck in the parking lot. Officer Cloer approached defendant on foot and asked to speak with him. While speaking with defendant, Officer Cloer noticed an odor of alcohol coming from defendant and observed an unopened can of beer in the truck. Defendant told Officer Cloer that he was going to a funeral in Alabama. Officer Cloer noted that defendant had slurred speech. Due to his observations, Officer Cloer asked defendant to get out of his vehicle. While attempting to get out of his truck, defendant stumbled and nearly fell and used the side of the vehicle to maintain his balance.

Officer Cloer, certified in standardized field sobriety testing, instructed defendant to perform the “Horizontal Gaze Nystagmus” test. While Officer Cloer was performing the test, Officer Cloer observed six out of the six signs indicating impairment. He also asked defendant to perform the “Walk and Turn” test. While attempting to administer the test, defendant continued to ask questions during the instructional phase, lost his footing three times, used his arms for balance, and started the test without being asked. Due to these actions, Officer Cloer terminated the test and placed defendant under arrest for Driving While Impaired.

During the process of his arrest, defendant asked to be let go if he told Officer Cloer a location where drugs and stolen guns could be found. Officer Cloer explained that defendant was under arrest and he was not able to make any deals with defendant. Defendant was then transported to the jail where he subsequently refused to take the Intoxilyzer breath test to determine his blood alcohol level. Officer Cloer obtained a search

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warrant from the magistrate in order to perform a blood test on defendant. Defendant was transported to Memorial Mission Hospital where his blood was drawn in an ambulance in the parking lot.

On 3 October 2011, defendant was indicted for habitual impaired driving and operating a motor vehicle without an operator's license. On 5 March 2012, defendant was indicted on attaining habitual felon status and failure to appear on the charge of habitual impaired driving after being released. On 5 July 2013, defendant filed a motion to suppress all evidence obtained from the alleged illegal seizure, arguing that Officer Cloer lacked reasonable articulable suspicion of criminal wrongdoing. The same day, defendant also filed a motion to suppress blood seized from defendant, and a motion to suppress evidence of statements made by defendant. On 29 July 2013, defendant filed a motion to exclude and objection to evidence of his alleged refusal of the Intoxilyzer test.

Defendant's trial came on for hearing on the 29 July 2013 criminal session of Buncombe County Superior Court. At the hearing, Aaron Wakenhut, the employee who called in the report of an intoxicated person, testified to his observations in the store. He could not remember the incident at the time of the trial, but testified by reading his witness statement aloud. In his statement he said that "the man was stumply [sic] walking, made a slight mess with hot water for his soup. Hard time talking and slurred. Took a very long time to respond." By order entered 1 August 2013, the trial court denied the motions to suppress. The order made the following pertinent findings of fact:

1. During the late evening hours of July the 4th, 2011, while on duty, Officer Cloer from the Asheville Police Department was dispatched to a gas station on Haywood Road to investigate an impaired person, and that he went there and that he parked his vehicle, got out, and observed the Defendant driving a truck in the parking lot.
2. That Officer Cloer went up to the Defendant's truck, at which time it was stopped, asked if he could speak to the Defendant, then detected the odor of alcohol, and at that same time observed an unopened container of beer in the truck, and then upon observing that and smelling that and opining that the Defendant had slurred speech, he was unsteady on his feet, he had him submit to field sobriety tests.

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. . . .

6. The officer did not observe the Defendant driving, except in the lot; however, he was dispatched there for the purpose of investigating the potential of that illegal activity, and that the Defendant was under the wheel of a truck that was moving and the motor was on and it was in a public vehicular area.

On 6 August 2013, defendant pled guilty to the charge of habitual driving while impaired and attaining habitual felon status, while preserving his right to appeal his motion to suppress. The charges of no operator's license and failure to appear on the charge of habitual impaired driving after being released were dismissed. Defendant was sentenced to a term of 66 to 89 months imprisonment. Defendant entered notice of appeal on 6 August 2013.

II. Standard of Review

Our review of a trial court's 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). Any unchallenged findings of fact are "deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). The trial court's conclusions of law are fully reviewable *de novo* on appeal. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (alteration in original) (internal quotation marks and citations omitted).

III. Discussion

Defendant's sole argument on appeal is that the trial court erred when it denied his motion to suppress all evidence stemming from the initial stop because Officer Cloer made an illegal stop of defendant's vehicle. Defendant contends that the initial stop was illegal because it was not warranted by a reasonable and articulable suspicion of criminal activity.

The Fourth Amendment of the Constitution provides the right of people to be secure in their persons and protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV. However, the

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United States Supreme Court has held that “[n]o one is protected by the Constitution against the mere approach of police officers in a public place.” *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (quoting *State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973)). The Supreme Court has also held that “a seizure does not occur simply because a police officer approaches an individual and asks a few questions.” *Florida v. Bostick*, 501 U.S. 428, 434, 115 L. Ed. 2d 389, 398 (1991).

Our Supreme Court held in *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994), that neither reasonable suspicion nor probable cause were required for an agent to approach the defendant and engage in conversation. In *Brooks*, the officer approached the vehicle while the defendant was sitting in the driver’s seat. *Id.* at 137, 446 S.E.2d at 583. The officer shined a flashlight on the defendant and noticed an empty holster within the reach of the defendant. *Id.* The officer asked where his gun was located and the defendant responded that he was sitting on the gun. *Id.* The officer asked the defendant to “ease it out real slow” and the defendant reached under his right thigh and handed the gun to the officer. *Id.* The defendant was allowed to exit and enter the vehicle multiple times during the interaction. Without putting the defendant under arrest, the officer asked him if he had any “dope” in the car. The defendant replied in the negative and asked if the officer would like to search the vehicle. *Brooks* at 137-38, 446 S.E.2d at 583. Upon searching the vehicle, with the defendant’s help, the officer discovered a bag of cocaine and arrested the defendant for possession of cocaine and carrying a concealed weapon. *Id.* at 138, 446 S.E.2d at 583-84. The defendant filed a motion to suppress the search and seizure of drugs from his vehicle, arguing that the officer lacked probable cause. *Id.* at 136, 446 S.E.2d at 582-83. The Court found that there was no evidence that the officer “made a physical application of force or that the defendant submitted to any show of force.” *Id.* at 142, 446 S.E.2d at 586. Our Supreme Court held that “[o]fficers who lawfully approach a car and look inside with a flashlight do not conduct a ‘search’ within the meaning of the Fourth Amendment. If, as a result, the officers see some evidence of a crime, this may establish probable cause to arrest the occupants.” *Brooks* at 144, 446 S.E.2d at 587 (internal citations omitted).

In *State v. Isenhour*, 194 N.C. App. 539, 670 S.E.2d 264 (2008), officers were patrolling in a high crime area when they observed the defendant and a passenger parked in the back corner of a fast food restaurant parking lot. The officers parked the patrol car eight feet away from the defendant’s vehicle and approached on foot. *Id.* at 540, 670 S.E.2d at 266. The defendant’s window would not roll down so he opened the car door

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to speak with the officers. Due to the inconsistency between the defendant's and passenger's reason for being in the parking lot, the defendant was asked to exit his vehicle. *Id.* at 541, 670 S.E.2d at 266. The officer patted down the defendant and asked for consent to search his vehicle. The defendant consented, and while searching the vehicle, the officers found a pill bottle containing methadone pills. *Id.* This Court found that the officer did not create "any real 'psychological barriers' to defendant's leaving such as using his police siren, turning on his blue strobe lights, taking his gun out of his holster, or using threatening language." *Id.* at 544, 670 S.E.2d at 268. Our Court held that the officer's actions did not constitute a seizure of the defendant, so "no reasonable suspicion was required for [the officer] to approach defendant's car and ask him questions." *Id.*

In this case, similar to *Brooks*, there is no evidence that Officer Cloer used any physical force when approaching defendant. Officer Cloer approached defendant's vehicle and engaged in conversation with him, as the officer did in *Brooks*. He testified that he walked up to defendant's car on foot and asked to speak with him. During that conversation, Officer Cloer observed signs of intoxication (the odor of alcohol on defendant, an unopened can of beer, and slurred speech) leading him to investigate defendant further. Similar to *Isenhour*, Officer Cloer also did not use any "psychological barriers" while initiating contact with defendant. He testified that he did not activate his blue lights and there is no evidence that he removed his gun from his holster or used a threatening tone initiating contact with defendant. Thus, as found in *Brooks* and *Isenhour*, Officer Cloer engaged in a voluntary encounter with defendant.

The test for determining whether a seizure has occurred "is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida* at 437, 115 L. Ed. 2d at 400 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L. Ed. 2d 565 (1988)). In the present case, Officer Cloer pulled into the parking lot of the gas station and parked his vehicle. He testified that he did not pull his vehicle in behind defendant's car, he did not activate his blue lights, and there is no evidence that he spoke in a threatening tone. He further testified that he got out of his vehicle and approached defendant's truck on foot and asked to speak with defendant. Our Supreme Court has held that these actions do not constitute a "seizure" of defendant. *See State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994). Because defendant was not "seized" by Officer

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Cloer's approach and initial questioning, reasonable suspicion of criminal activity is not required.

Unlike a voluntary encounter, "[a]n investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). Reasonable suspicion requires that

[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training. The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.'

Id. at 441-42, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)) (quotation marks and internal citations omitted). "The Fourth Amendment requires that police have an articulable and reasonable suspicion of criminal conduct *before* making an investigative stop of an automobile." *United States v. Arzaga*, 9 F.3d 91, 93 (10th Cir. 1993) (emphasis added).

Since we have determined that Officer Cloer's initial interaction with defendant was a voluntary encounter, his personal observations during that time may be used to determine reasonable suspicion for the subsequent investigatory stop. When he approached defendant's vehicle, Officer Cloer noticed the odor of alcohol coming from defendant and observed an unopened container of beer in defendant's truck. This Court has previously held that similar observations observed during a consensual encounter establish reasonable suspicion to further detain and investigate defendant. *State v. Veazey*, 191 N.C. App. 181, 195, 662 S.E.2d 683, 692 (2008) (stating that during the initial lawful checkpoint detention, the officer's observations of "a strong odor of alcohol in the vehicle and . . . that Defendant's eyes were red and glassy . . . provided a sufficient basis for reasonable suspicion permitting Trooper Carroll to pursue further investigation and detention of Defendant").

Officer Cloer initiated an investigatory stop when, suspecting that defendant was impaired, he asked defendant to step out of his vehicle to further investigate. We find that his personal observations of the odor of alcohol and an unopened container of beer made during the voluntary encounter are a sufficient basis for reasonable suspicion to support the stop.

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Defendant also argues that the basis of his stop was from an anonymous tip. The report of an impaired driver came from information given by an unnamed employee. Since the caller was not identified by name, defendant argues that these facts constitute a stop based on an anonymous tip.

It is well established that “[a]n anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability.” *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000). Even if a tip lacks sufficient indicia of reliability, it “may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration.” *Id.* “In sum, to provide the justification for a warrantless stop, an anonymous tip ‘must have sufficient indicia of reliability, and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made.’” *State v. Peele, Jr.*, 196 N.C. App. 668, 672, 675 S.E.2d 682, 685 (2009) (quoting *Hughes* at 207, 539 S.E.2d at 630).

In *United States v. Quarles*, 330 F.3d 650 (4th Cir. 2003), an individual called 911 and reported that the defendant was walking down Nash Street and was wanted by the U.S. Attorney’s Office. The caller provided a description, including that the defendant was a black male with dreadlocks, and an accurate description of what the defendant was currently wearing. *Id.* at 652. The 911 operator asked the caller why the U.S. Attorney’s office was interested in the defendant. The caller stated that he was wanted for carrying a gun and that the defendant had killed the caller’s brother, but had “beat the case.” *Id.* The caller was kept on the phone with the operator and continued to follow the defendant, keeping the operator updated until the caller saw officers arrive and put the defendant on the ground. *Id.* The court stated that “the caller here gave enough information to be identified later, and therefore, was not totally anonymous at any time.” *Quarles* at 654. It also held that the caller “provided sufficient information to the police that he could have been held accountable for his statements.” *Id.* at 656.

Similarly, in the present case, the caller was identified as an employee of the Citistop gas station where defendant’s car was located. This information was sufficient to ascertain his identity when police arrived. The second officer on the scene, Officer McCullough, was able to identify the caller as Aaron Wakenhut and obtain a statement from him. Thus, Wakenhut was “bound to have felt as though he was being held accountable for what he was saying.” *Quarles* at 656. Wakenhut also gave information based off his personal observations of defendant’s behavior inside the store. He testified that defendant was stumbling, made a mess with the hot water for his soup, had slurred speech, a hard

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time talking, and took a very long time to respond. Accordingly, the tip in this case would be a more reliable tip than a true anonymous caller case where the caller gives no identifying information.

Since we have determined defendant was not seized when Officer Cloer approached him and engaged in conversation, Officer Cloer was able to corroborate the caller's information before initiating a stop. Officer Cloer's personal observations of the odor of alcohol coming from defendant and an unopened container of beer on the passenger seat corroborated the caller's tip of an impaired person. Officer Cloer's observations during the voluntary encounter with defendant, prior to asking him to get out of his vehicle, along with the information from the caller's tip, established reasonable suspicion for the stop.

Defendant cites to *State v. Blankenship*, __ N.C. App. __, 748 S.E.2d 616 (2013), as his main source of authority for why the trial court erred. In *Blankenship*, officers received a "be-on-the-lookout" message from dispatch. A taxicab driver anonymously called 911 and reported that he observed a red Mustang convertible with a black soft top driving erratically, running over traffic cones, and continuing west on Patton Avenue. *Id.* at __, 748 S.E.2d at 617. The caller also provided the license plate, "XXT-9756". *Id.* A few minutes later, the officers spotted a red Mustang with a black soft top and an "X" in the license plate heading west on Patton Avenue. *Id.* When the officers caught up to the vehicle, it had made a turn and was approaching a security gate. *Id.* As the driver attempted to open the gate, the officers activated their blue lights and stopped the defendant. *Blankenship* at __, 748 S.E.2d at 617. At this time, the officers had not observed the "defendant violating any traffic laws or see any evidence of improper driving that would suggest impairment[.]" When one of the officers spoke to the defendant, he detected a strong odor of alcohol and asked him to perform field sobriety tests. *Id.* Based on his performance, the defendant was arrested for driving while impaired. This Court found that the officers were unable to judge the caller's "credibility and to confirm firsthand that the tip possessed sufficient indicia of reliability. Since [the caller's] anonymous tip did not possess sufficient indicia of reliability, [the officers] did not possess reasonable, articulable suspicion to stop defendant's car." *Id.* at __, 748 S.E.2d at 620.

This case is distinguishable from *Blankenship* in two distinct ways. In *Blankenship*, the call was a true anonymous tip because the taxicab driver did not give any information that would enable the caller to be identified. His identity was only discovered because the 911 operator was able to go back and trace the phone number. *Id.* at __, 748

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S.E.2d at 617. By not identifying himself, the officers could not judge the caller's credibility. "Since the officers did not have an opportunity to assess his credibility," the caller lacked sufficient indicia of reliability. *Id.* at ___, 748 S.E.2d at 618. However, in this case, the caller was identified as an employee of the business where defendant was located, thus giving enough information that allowed for his identity to be ascertained at the scene and making him a more reliable tipster than the one in *Blankenship*.

In *Blankenship*, although the officers did not personally observe the defendant committing any unlawful behavior, they immediately initiated a stop by activating their blue lights as the "driver, defendant, attempted to open the gate." *Id.* at ___, 748 S.E.2d at 617. The initial encounter was not voluntary because the immediate activation of their blue lights acted as a show of authority that would make a reasonable person feel that they were not free to leave. Because it was not voluntary, reasonable suspicion was required to conduct the stop. In the case at hand, Officer Cloer did not activate his blue lights when he pulled into the parking lot and parked his car away from defendant's vehicle. He approached defendant on foot and engaged in a conversation in a voluntary encounter allowing Officer Cloer to make his own personal observations of the odor of alcohol and an unopened container of beer inside the car. Thus, unlike in *Blankenship*, Officer Cloer was able to personally observe defendant's behavior to corroborate the caller's tip prior to initiating the stop and he was able to form the necessary reasonable suspicion of criminal activity. Therefore, defendant's reliance on *Blankenship* is misplaced.

IV. Conclusion

We conclude that the initial encounter between Officer Cloer and the defendant was a voluntary encounter and thus did not require reasonable suspicion. Accordingly, Officer Cloer's observations during the consensual encounter (the odor of alcohol and an unopened container) established reasonable suspicion to further detain and investigate the defendant. Based on the foregoing, we hold the trial court properly denied defendant's motion to suppress all evidence stemming from the initial stop.

Affirmed.

Judges ELMORE and DAVIS concur.

STATE v. WATLINGTON

[234 N.C. App. 580 (2014)]

STATE OF NORTH CAROLINA

v.

THORNE OLIVER WATLINGTON

No. COA13-661

Filed 1 July 2014

1. Appeal and Error—appellee’s brief—not timely—motion to dismiss—denied

Defendant’s motion to strike the State’s brief as untimely filed was denied. The filing of an appellee’s brief is not a prerequisite for the perfection of an appeal and an appellee’s failure to file a brief in a timely manner should not result in striking the brief, absent a showing of material prejudice to the appellant. The record here clearly established that defendant did not demonstrate particularized prejudice and defendant’s motion was denied in an exercise of the Court of Appeal’s discretion. However, the State’s counsel was strongly admonished to refrain from such conduct.

2. Evidence—text messages—not prejudicial

Defendant’s contention that the trial court erred by sustaining the State’s objections to the admission of evidence concerning the contents of certain text messages was overruled. Assuming without deciding that the text messages were properly authenticated and were relevant, there was no reasonable possibility that the outcome would have been different otherwise.

3. Criminal Law—instructions—eyewitness identification

The trial court did not err in a prosecution for armed robbery and other offenses by refusing to give defendant’s requested instruction on eyewitness identification evidence. The instruction that defendant requested bore a strong resemblance to the New Jersey instruction developed as a result of *State v. Henderson*, 208 N.J. 208, which contained numerous factual statements about the impact of weapons, focus, stress, racial differences, and the degree of certainty expressed by the witness. Given that there was no such evidence in the present record, along with the instructions actually given, the trial court did not err by declining to deliver defendant’s requested instruction.

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[234 N.C. App. 580 (2014)]

Appeal by defendant from judgments entered 5 October 2012 by Judge Henry W. Hight, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 9 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders John F. Carella and Benjamin Dowling-Sendor, for Defendant.

ERVIN, Judge.

Defendant Thorne Oliver Watlington appeals from judgments sentencing him to a term of eight to ten months imprisonment based upon his conviction for felonious breaking or entering, to a consecutive term of eight to ten months imprisonment based upon his conviction for felonious larceny, to a consecutive term of fourteen to seventeen months imprisonment based upon his conviction for possession of a firearm by a felon, and to a consecutive term of sixty days imprisonment based upon his conviction for assault by pointing a gun. On appeal, Defendant contends that the trial court erred by refusing to admit the contents of certain text messages and by failing to deliver his requested instruction concerning the manner in which the jury should evaluate the validity of eyewitness identification evidence. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

a. Background Information

Defendant's cousin, Loven McLaughlin, has known Defendant his entire life. In the summer of 2011, Defendant came to live with Loven McLaughlin and Loven McLaughlin's mother in the Forestdale Apartments because Defendant was not getting along with his own parents. In the latter part of July, Loven McLaughlin's mother told Defendant that he would have to leave. After Defendant's departure, Loven McLaughlin noticed that Defendant was sleeping in the woods near the Mellow Mushroom.

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[234 N.C. App. 580 (2014)]

b. Firearm Theft

In July 2011, Cody May, who had gone to high school with Defendant, lived in the Forestdale Apartments. After seeing Defendant in the apartment complex, Mr. May reestablished a connection with him.

On 25 July 2011, Mr. May stayed home from work. At noon, he left to go to a medical appointment with his girlfriend to learn the gender of their baby. As a result of the fact that Defendant was present when Mr. May departed, the two of them left simultaneously. Defendant had only been to Mr. May's apartment on a few occasions before the date in question.

About forty-five minutes after leaving his apartment, Mr. May realized that he had forgotten something and returned home. Upon arriving at his apartment, Mr. May discovered that the back door had been kicked in and that an Xbox video game system; three rifles, including a Norinco SKS with a laser sight and that held 7.62 millimeter rounds; and a laptop had been stolen.

c. Mellow Mushroom Incident

Kenneth Pryor was working at the Mellow Mushroom on the evening of 27 July 2011. After going outside for a cigarette break, Mr. Pryor noticed a man exiting his truck. Upon making this observation, Mr. Pryor yelled at and ran towards the intruder, causing him to head in the opposite direction. As Mr. Pryor caught up with the intruder, the intruder turned around, pulled what appeared to be an SKS rifle out of a bag, pointed it at Mr. Pryor, and told him to lie down on the ground. Instead of complying with this command, Mr. Pryor ran in the opposite direction.

A few days later, Mr. Pryor identified Defendant as his assailant after viewing a photographic lineup, claiming to be 90% certain that his identification was accurate. At trial, however, Mr. Pryor only expressed a 50% certainty that his identification of Defendant as the assailant was correct. In support of Mr. Pryor's identification testimony, Loven McLaughlin testified that he had gone to the Mellow Mushroom on the date of the incident involving Mr. Pryor so that Defendant could use his cell phone and that, upon arriving at the Mellow Mushroom, he had observed Defendant being chased, displaying a firearm with a laser sight, and chasing the individual who had been pursuing him.

d. Arby's Incident

On the night of 29 July 2011, Anja Frick and Jessi Richardson were working at the Arby's Restaurant on Huffman Mill Road. After helping

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Ms. Frick close the store at around 1:40 a.m., Ms. Richardson got into her car. At that point, she noticed an African-American male standing beside her car and gesturing as if he wanted her to roll down her window or exit the car. After Ms. Richardson did neither, the man went away.

As Ms. Frick locked the door to the store, she saw a light emanating from a laser shining on the wall beside her. Although Ms. Frick initially believed that the light had been caused by a co-worker or either her father or her brother, who had come to pick her up, an individual approached her as she neared the vehicle in which she was to ride. After telling this person to go away, Ms. Frick realized that another individual was holding a long gun with a laser sight to her father's head on the other side of the car.

After Ms. Frick's father stated that he did not have any money, the individual who had approached Ms. Frick said, "just shoot him." At that point, Ms. Frick's father realized that another person was present and saw that this person was pointing a rifle directly at his head. Eventually, the armed assailant took wallets from both Ms. Frick's father and brother and took a cell phone from her brother before running towards the woods with the individual who had approached her. As the men ran away, one of them said, "give me the gun." Ms. Frick then went to a nearby Walmart with her father and brother and called the police. Andre McLaughlin, Loven McLaughlin's first cousin, testified that he and Defendant had committed the Arby's robbery.

On the following morning, Ms. Frick's father and brother returned to the scene of the robbery in the hope of finding their wallets, which contained family photographs. As the two men looked for their wallets, they found an identification card that contained a photograph of Defendant near the edge of the parking lot. Ms. Frick's father stated, "that's the guy that robbed us," as soon as he looked at it. Ms. Frick's father had a 70% level of confidence in the accuracy of his identification of the person depicted on the identification card as one of the perpetrators of the robbery. He then called the police, informed them that he had found the card, and left it in their possession. At trial, Ms. Frick's father identified Defendant as being the individual who had robbed him and his son.

e. Apprehension of Suspects

During the course of the investigation into the Arby's robbery, Ms. Frick's brother provided Detective Gary Matthew Fitch of the Burlington Police Department with his cell phone number. After Detective Fitch called Ms. Frick's brother's cell phone in order to determine its location, investigating officers went to the Forestdale Apartments and began

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randomly knocking on doors for the purpose of seeking information concerning the Arby's robbery.

At approximately 12:30 p.m., the investigating officers went to Apartment H-F. After knocking and receiving no response, the investigating officers noticed two cell phones in the rear of a nearby Honda automobile, one of which resembled the cell phone that had been taken from Ms. Frick's brother. In addition, the investigating officers noticed that there was a rifle shell in the front seat. Upon calling the number assigned to Ms. Frick's brother's cell phone, the investigating officers heard a cell phone vibration emanating from the interior of the Honda automobile.

At approximately 3:00 p.m., Rashawn Alston emerged from Apartment H-F and entered the Honda automobile. Investigating officers detained Mr. Alston before he was able to leave. About an hour later, Loven and Andre McLaughlin came out of the same apartment and were taken into custody. Upon learning that yet another individual remained in the apartment, investigating officers entered the apartment and detained Defendant. During a subsequent search of the apartment, officers found a wallet that resembled the one that had been taken from Ms. Frick's father. At a nearby abandoned building, investigating officers found a vehicle that contained a rifle with an attached laser sight and 7.29 by 39 millimeter rounds that had been loaded into an SKS magazine. In addition, Defendant's fingerprints were found on an ammunition box seized from the vehicle.

2. Defendant's Evidence

Defendant and Loven McLaughlin, with whom he had grown up, are second cousins. Defendant knew Andre McLaughlin from high school. After graduating high school, Defendant enlisted in the Army. While serving in the military, Defendant was arrested for being in a stolen vehicle, entered a negotiated plea to a felony, and received a twelve-month sentence.

After his release from incarceration, Defendant went to stay with Loven McLaughlin. Defendant denied that Loven McLaughlin's mother had requested that he leave and claimed, on the contrary, that Loven McLaughlin was in the process of leaving as the result of numerous noise complaints. Upon being re-called, however, Loven McLaughlin testified that his mother had told Defendant that he needed to leave because she had heard that he was getting into trouble around town.

After coming to live with Loven McLaughlin, Defendant visited Mr. May, whom he had known in high school, on three occasions. On the first visit, during which he was accompanied by Loven McLaughlin, Mr. May

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showed a pistol to the two men. In the course of the second visit, during which Loven McLaughlin was not present, Mr. May showed Defendant a number of guns and asked for Defendant's help in locating a purchaser for these weapons. Mr. May did not ever show Defendant an SKS rifle. Subsequently, Defendant mentioned Mr. May's request to Loven McLaughlin and Mr. Alston, whom he had met at Loven McLaughlin's apartment. The third and final visit to Mr. May's apartment occurred on the day of the theft. During his visits to Mr. May's apartment, Defendant had noticed ammunition crates in the living room and touched one of them given his curiosity about what was inside.

Defendant denied having returned to Mr. May's apartment on the day of the theft, breaking into Mr. May's apartment, or stealing firearms and ammunition from Mr. May. Similarly, Defendant denied having asked Loven McLaughlin to come to the Mellow Mushroom or having pointed a firearm at Mr. Pryor.

Although he initially told investigating officers that he and his friends had been at home at the time of the Arby's robbery, Defendant testified at trial that, after Loven McLaughlin and Andre McLaughlin arrived at the apartment, a woman named Sonia, whose last name he did not recall, picked him up and took him to a hotel, where they stayed all night. The following morning, Defendant returned to Loven McLaughlin's apartment, where he fell asleep. Upon awakening, Defendant noticed that the house was empty, called Loven McLaughlin's phone to find out where he was, and went to a Kmart for the purpose of meeting Loven McLaughlin and Andre McLaughlin.

Subsequently, Mr. Alston picked the group up and took them back to Loven McLaughlin's apartment. After arriving at the apartment, however, Loven McLaughlin observed that investigating officers were in the area. Although an officer knocked on the door, no one answered. At that point, Defendant decided to sleep for a few hours.

Once Defendant woke up, the members of the group began leaving the apartment. However, Defendant decided to use the restroom before exiting. As he left the restroom, investigating officers entered the apartment and took him into custody. He was then taken to the police department for questioning.

Defendant speculated that he might have dropped his identification card near the Arby's at which the robbery occurred since he regularly used a walking route near that location. In a letter that Defendant wrote to Mr. May after his incarceration, Defendant denied having stolen anything from Mr. May, claimed to have been in Raleigh at the time of the

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theft, and opined that Mr. Alston had committed the theft given that evidence of the theft had been found in his car. In addition, Defendant told Mr. May that he had reached the conclusion that Mr. Alston was the culprit because Mr. Alston had mentioned an Xbox 360 to him and because Defendant had told Mr. Alston about Mr. May's guns. Finally, Defendant requested that Mr. May contact Loven McLaughlin on his behalf and provided Mr. May with Loven McLaughlin's number, which he listed as (336) 263-9913.

B. Procedural History

On 31 July 2011, warrants for arrest were issued charging Defendant with two counts of robbery with a dangerous weapon, two counts of attempted robbery with a dangerous weapon, possession of a stolen motor vehicle, possession of stolen property, breaking or entering a motor vehicle, assault by pointing a gun, financial transaction card theft, and possession of a firearm by a felon. On 29 August 2011, the Alamance County grand jury returned bills of indictment charging Defendant with two counts of robbery with a dangerous weapon; two counts of attempted robbery with a dangerous weapon; possession of a stolen motor vehicle; possession of stolen property; breaking or entering into a motor vehicle; assault by pointing a gun; financial transaction card theft; and possession of a firearm by a felon. On 1 September 2011, a warrant for arrest charging Defendant with felonious breaking or entering, felonious larceny, and possession of stolen goods was issued. On 5 March 2012, the Alamance County grand jury returned a bill of indictment charging Defendant with felonious breaking or entering, felonious larceny, and possession of stolen goods. On 25 September 2012, the State voluntarily dismissed the financial transaction card theft charge.

The charges against Defendant came on for trial at the 25 September 2012 criminal session of the Alamance County Superior Court before the trial court and a jury. At the conclusion of the trial, the jury found Defendant guilty of felonious breaking or entering, felonious larceny, one count of felonious possession of stolen property, breaking or entering a motor vehicle, assault by pointing a gun, and possession of a firearm by a convicted felon; not guilty of one count of attempted robbery with a firearm, possession of a stolen motor vehicle, and a second count of possession of stolen property; and failed to reach a unanimous verdict with respect to two counts of robbery with a dangerous weapon and a second count of attempted robbery with a dangerous weapon.¹ After arresting

1. The effect of the jury's verdict in practical terms was to convict Defendant of breaking into Mr. May's apartment and stealing his laptop computer, Xbox, and firearms;

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judgment in connection with Defendant's conviction for possession of stolen property, the trial court entered judgments sentencing Defendant to four consecutive active terms totaling thirty-two to thirty-nine months imprisonment, and one suspended term of six to eight months imprisonment, with Defendant being placed on supervised probation for a period of thirty-six months subject to certain terms and conditions. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Motion to Strike the State's Brief

[1] As an initial matter, we must address Defendant's motion to strike the State's brief, which was filed in an untimely manner without any justification or excuse and after several extensions of the time within which it was authorized to do so had been obtained. Although the complete failure on the part of counsel for the State to comply with our rules concerning the timing within which the State's brief should have been filed is quite troubling and although we strongly admonish counsel for the State to refrain from engaging in such conduct in the future, we conclude that Defendant's dismissal motion should be denied for a number of reasons.

As an initial matter, we note that the filing of an appellee's brief, as compared to the filing of an appellant's brief, is not a prerequisite for the perfection of an appeal. According to the relevant provisions of the North Carolina Rules of Appellate Procedure, while "the appeal may be dismissed" "[i]f an appellant fails to file and serve a brief within the time allowed," an appellee's failure to file his or her brief in a timely manner simply means that he or she may not "be heard in oral argument except by permission of the court." N.C.R. App. P. 13(c). For that reason, decisions such as *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 706, 567 S.E.2d 184, 186-87 (2002), and *Dalenko v. Wake Cnty. Dep't of Human Servs.*, 157 N.C. App. 49, 53-54, 578 S.E.2d 599, 602, cert. denied, 357 N.C. 457, 585 S.E.2d 383 (2003) cert. denied sub nom *Bennett v. Wake Cnty. Dep't of Human Servs.*, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004), in which this Court dismissed appeals based upon the appellant's failure to file a brief, shed little light

breaking into Mr. Pryor's motor vehicle, assaulting Mr. Pryor by pointing a gun, and possessing a firearm at the time of the assault upon Mr. Pryor; to acquit Defendant of attempting to rob Ms. Richardson with a dangerous weapon, possessing Ms. Frick's brother's wallet, and possessing a stolen motor vehicle; and to fail to reach agreement with respect to the issue of whether Defendant robbed Ms. Frick's father and brother and attempted to rob Ms. Frick.

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on the proper resolution of this issue. As a result, since nothing in the relevant provisions of the North Carolina Rules of Appellate Procedure mandates the striking of the State's brief, we must evaluate the merits of Defendant's motion to strike based upon an analysis of the decisions governing the manner in which violations of the North Carolina Rules of Appellate Procedure should be sanctioned.

Although the Rules of Appellate Procedure "are mandatory and [the] failure to follow these rules will subject an appeal to dismissal," *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999), "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). Instead, N.C.R. App. P. 25(b) and N.C.R. App. P. 34 provide this Court with substantial discretion in determining an appropriate sanction in the event that a party commits a non-jurisdictional violation of the North Carolina Rules of Appellate Procedure.

Admittedly, a decision to strike a party's brief is not as significant as a decision to dismiss a party's appeal. However, striking an appellee's brief is among the most significant sanctions, if not the most significant, that can be imposed upon an appellee. For that reason, we are inclined to believe that an appellee's failure to file his or her brief in a timely manner should not, as a general proposition, result in the striking of that party's brief in the absence of a showing that the appellee's conduct has resulted in material prejudice to the appellant. Although the record clearly establishes that the State has completely failed to provide any legitimate excuse for its failure to file its brief in a timely manner, the record also clearly establishes that Defendant has not demonstrated that he suffered any particularized prejudice as a result of the State's lack of timely action. As a result, we hereby conclude, in the exercise of our discretion, that Defendant's motion to strike the State's brief should be, and hereby is, denied. Counsel for the State is, however, strongly admonished to refrain from engaging in such inexcusable conduct in the future and should understand that any repetition of the conduct disclosed by the present record will result in the imposition of significant sanctions upon both the State and himself personally.

B. Substantive Legal Issues

1. Admissibility of Text Messages

[2] In his brief, Defendant contends that the trial court erred by sustaining the State's objections to the admission of evidence concerning the contents of certain text messages obtained by investigating officers

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during an examination of Mr. Alston's cell phone. More specifically, Defendant contends that the cell phone messages were relevant and properly authenticated and that the exclusion of the evidence in question prejudiced his chances for a more favorable outcome at trial. We do not find Defendant's argument persuasive.

a. Relevant Facts

The phone number listed on Loven McLaughlin's arrest report was (336) 263-9913. According to Loven McLaughlin, the investigating officers did not confiscate his cell phone at the time that he was taken into custody and never asked him to verify his phone number. In addition, Loven McLaughlin testified that he could not remember the cell phone number assigned to his phone as of the date upon which he was arrested given the large number of phones that he had utilized.

Although Detective Jennifer Bradley Matherly of the Burlington Police Department prepared Loven McLaughlin's arrest report, she acknowledged that the names, dates, phone numbers, and other information that she recorded on that document could have emanated from a range of sources, such as information provided by the suspect, information contained in the warrant for arrest, or information on file with or available to the Burlington Police Department. For that reason, Detective Matherly indicated that, while she could have confirmed a phone number shown on the arrest report with the suspect, she might have obtained that information in another way as well and did not know the source of any specific item of information shown on Loven McLaughlin's arrest report. Detective Matherly did state, however, that she would not have used information obtained from one suspect in filling out an arrest report relating to a different suspect.

After recovering Mr. Alston's cell phone, investigating officers photographed each individual text message found in that instrument. During this process, investigating officers found messages sent to Mr. Alston from individuals identified as "LuvBoat" and "SnakeNDAGrass." Although Andre McLaughlin testified that Mr. Alston referred to Loven McLaughlin as "LuvBoat," Loven McLaughlin denied that Mr. Alston called him by that name and asserted, instead, that Mr. Alston called him "Slogey." In addition, Loven McLaughlin testified that he was not planning on moving, that he is not related to Mr. Alston, and that he and Mr. Alston never referred to each other as "cuz."

After Defendant began to cross-examine Loven McLaughlin about the text messages taken from Mr. Alston's phone, the State lodged a successful objection. Subsequently, during his own case in chief, Defendant

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sought to obtain the admission of the text messages in question. However, the trial court sustained the State's objection to the admission of these text messages. In both instances, the State's objections were predicated on authentication and relevance grounds.

The text messages sought to be introduced showed a callback number of (336) 263-9913. Without reciting the contents of these text messages in their entirety, certain messages that "LuvBoat" sent to Mr. Alston's phone contained repeated statements concerning "LuvBoat's" need for money in order "to find a place to stay," inquiring if "ur cuzin" was going to "sell it," and asking if Mr. Alston had "got the money." During the same time that he was receiving these text messages from "LuvBoat," messages were sent from Mr. Alston's phone to "Cuz" stating "u gta choppa" and "r u strap[p]ed." The undisputed evidence reflects that "choppa" is a reference to an assault rifle, while the fact that someone is "strapped" means that he or she is in possession of a weapon.

b. Admissibility of Text Messages

According to well-established North Carolina law, the requirement that an item be properly authenticated before being admitted into evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a). "A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *State v. Crawley*, __ N.C. App. __, __, 719 S.E.2d 632, 637 (2011), *disc. review denied*, 365 N.C. 553, 722 S.E.2d 607 (2012). Similarly, evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. "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 [N.C. Gen. Stat. § 8C-1,] Rule 403, such rulings are given great deference on appeal.'" *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992)). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a).

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Assuming, without deciding, that the text messages at issue in this case were properly authenticated and were relevant to the matters at issue at trial, we are unable to determine that there was a reasonable possibility that the outcome at Defendant's trial would have been different had these errors not been committed. The ultimate effect of the jury's verdicts was to convict Defendant of breaking into Mr. May's apartment and stealing various electronic items and firearms and breaking into Mr. Pryor's motor vehicle and pointing an assault rifle at him. In attempting to persuade us that the exclusion of these text messages constituted prejudicial error, Defendant contends that these messages undercut the credibility of Loven McLaughlin's testimony by refuting his contention that he, rather than Defendant, was being forced to move and suggested that Loven McLaughlin had been involved in the theft of the firearms from Mr. May's apartment and their subsequent use in the commission of other offenses given his attempt to get Mr. Alston to sell the firearms taken at that time. Although the record might support the inferences that Defendant contends should be drawn from these text messages, those inferences have little strength.

As an initial matter, even if the record suffices to support an inference that the text messages from "LuvBoat" were sent by Loven McLaughlin, the record contains substantial evidence that would support a contrary inference. Secondly, the record contains no evidence concerning the identity of "Cuz," to whom the text messages concerning the firearms were sent. Thirdly, the text messages from "LuvBoat" simply inquire whether "ur cuzin [is] goin to sell it," which is less than a clear cut reference to the sale of one or more firearms, much less those taken from Mr. May's apartment. Fourthly, the inference that the firearms referred to in the text messages to "Cuz" are the same weapons that had been taken from Mr. May's apartment is less than compelling. Finally, as the trial court noted, even if the text messages in question establish that Loven McLaughlin was involved in the entry into Mr. May's apartment, that fact, without more, does not exonerate Defendant of any involvement in the commission of that crime given the undisputed evidence that Defendant, Loven McLaughlin, Andre McLaughlin, and Mr. Alston were spending a great deal of time together during the time in which that crime was committed. As a result, the inference that Defendant wishes us to draw from the text messages in question is, at best, an ambiguous and equivocal one.

In addition, the record contains substantial additional evidence of Defendant's guilt. For example, the record contains the essentially undisputed testimony of Mr. May to the effect that Defendant was

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familiar with his property and that his apartment had been broken into and his property taken within a relatively short period of time after he and Defendant left the premises. In addition, Mr. Pryor identified Defendant as the individual who broke into his motor vehicle and pointed a rifle at him. Although the strength of Mr. Pryor's identification of Defendant waned between the time of the investigation and the time of trial, that fact, standing alone, should not divert our attention from the fact that the jury heard evidence that Mr. Pryor was 90% certain that Defendant was the individual who had broken into his vehicle and pointed an assault rifle at him shortly after the commission of those crimes. In short, the other evidence of Defendant's guilt, while perhaps not overwhelming, was certainly strong. As a result, given the limited strength of the inferences that Defendant wishes us to draw from the text messages at issue in this case coupled with the relative strength of the State's other evidence of Defendant's guilt, we are unable to say that Defendant has shown that there is a reasonable possibility that the outcome at trial would have been different had the evidence in question been admitted at Defendant's trial. For that reason, we hold that Defendant is not entitled to an award of appellate relief based upon this challenge to the trial court's judgments.

2. Jury Instructions

[3] Secondly, Defendant contends that the trial court erred by refusing to instruct the jury in accordance with his requested instruction relating to the manner in which it should consider the credibility of eyewitness identification evidence. More specifically, Defendant contends that the trial court should have informed the jury about the results of recent research into factors bearing upon the accuracy of such evidence during its instructions to the jury. Defendant is not entitled to relief from the trial court's judgments on the basis of this contention.

a. Standard of Review

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). For that reason, a "[f]ailure [by the trial court] to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). While "[i]t is well established in this jurisdiction that the trial court is not required to give a requested instruction in the exact language of the request," "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. Green*, 305 N.C. 463, 476-77, 290 S.E.2d 625, 633 (1982).

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This Court reviews issues relating to the substance of the trial court's instructions using a *de novo* standard of review. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

b. Applicable Background Information

In 2012, the New Jersey Supreme Court released a new pattern jury instruction addressing eyewitness identification issues² that was based upon its decision in *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011). In *Henderson*, the defendant contended “that the identification [of him as the culprit] was not reliable because the officers investigating the case intervened during the identification process and unduly influenced the eyewitness.” 208 N.J. at 217, 27 A.3d at 877. During its consideration of *Henderson*, the New Jersey Supreme Court ordered that an evidentiary hearing be held for the purpose of evaluating whether the “assumptions and other factors reflected in the two-part” test set out in *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), and the five factors that must be considered in the course of applying that test remained “valid and appropriate in light of recent scientific and other evidence.” *Id.* at 228, 27 A.3d at 884. On remand, the parties developed a record that included testimony from “seven experts and [contained] more than 2,000 pages of transcripts along with hundreds of scientific studies.” *Id.* at 217-18, 27 A.3d at 877. In reviewing the resulting special master's report, the New Jersey Supreme Court determined “that the scientific evidence considered at the remand hearing [was] reliable”; that, “based on the testimony and ample record developed at the hearing,” “a number of system and estimator variables can affect the reliability of eyewitness identifications”; and that the “evidence offer[ed] convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised.” *Id.* at 218, 283-85, 27 A.3d at 877, 916-17.

After making these preliminary determinations, the New Jersey Supreme Court concluded that, “[t]o evaluate whether there is evidence of suggestiveness to trigger a [pretrial] hearing, courts should consider the following non-exhaustive list of system variables,” including:

1. *Blind Administration*. Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the “envelope method” . . . to ensure that the administrator had no

2. *Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases*, (19 July 2012), <http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm>.

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knowledge of where the suspect appeared in the photo array or lineup?

2. *Pre-identification Instructions.* Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?

3. *Lineup Construction.* Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

4. *Feedback.* Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?

5. *Recording Confidence.* Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?

6. *Multiple Viewings.* Did the witness view the suspect more than once as part of multiple identification procedures? Did police use the same fillers more than once?

7. *Showups.* Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. *Private Actors.* Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. *Other Identifications Made.* Did the eyewitness initially make no choice or choose a different suspect or filler?

Id. at 289-91, 27 A.3d at 920-21. In addition, the New Jersey Supreme Court held that, in order to determine whether an identification was valid, courts should consider particular "estimator" variables, including:

1. *Stress.* Did the event involve a high level of stress?

2. *Weapon focus.* Was a visible weapon used during a crime of short duration?

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3. *Duration.* How much time did the witness have to observe the event?
4. *Distance and Lighting.* How close were the witness and perpetrator? What were the lighting conditions at the time?
5. *Witness Characteristics.* Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?
6. *Characteristics of Perpetrator.* Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?
7. *Memory decay.* How much time elapsed between the crime and the identification?
8. *Race-bias.* Does the case involve a cross-racial identification?

Some of the above estimator variables overlap with the five reliability factors outlined in *Neil v. Biggers, supra*, 409 U.S. at 199-200, 93 S. Ct. at 382, 34 L. Ed. 2d at 411, which we nonetheless repeat:

9. *Opportunity to view the criminal at the time of the crime.*
10. *Degree of attention.*
11. *Accuracy of prior description of the criminal.*
12. *Level of certainty demonstrated at the confrontation.*

Did the witness express high confidence at the time of the identification before receiving any feedback or other information?

13. *The time between the crime and the confrontation.* (Encompassed fully by “memory decay” above.)

Id. at 291-92, 27 A.3d at 921-22. After describing the manner in which the trial courts should evaluate the admissibility of eyewitness identification testimony, the New Jersey Supreme Court noted that “juries will continue to hear about all relevant system and estimator variables at trial, through direct and cross-examination and arguments by counsel”; directed that “enhanced instructions be given to guide juries about the

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various factors that may affect the reliability of an identification in a particular case” “[b]ased on the record developed on remand”; and created a process under which various committees would draft proposed revisions to the existing pattern instructions relating to the validity of eyewitness identification evidence based upon the determinations set out in the *Henderson* opinion for its consideration. *Id.* at 296, 298-99, 27 A.3d at 924-26.³

c. Defendant’s Requested Eyewitness Identification Instruction

The eyewitness identification instruction that Defendant requested the trial court to deliver in this case was eight pages long and contained language that bore a strong resemblance to the New Jersey instruction developed as a result of the *Henderson* decision. Among other things, Defendant requested the trial court to instruct the jury that “there are risks of making mistaken identifications” and that the jury should consider a number of factors in evaluating the credibility of the eyewitness identification testimony presented in this case, including, among other things, the witness’ “opportunity to view the person who committed the offense”; the witness’ “level of stress,” given that high levels of stress can reduce an eyewitness’s ability to recall; “[t]he amount of time [the witness had] to observe an event”; whether the “witness saw a weapon during the incident,” since “the presence of a visible weapon may reduce the reliability of a subsequent identification”; the distance between the witness and the person being identified; the adequacy of the lighting conditions at the time that the witness saw the perpetrator; the extent to which the witness’ level of intoxication “affect[ed] the reliability of the identification”; the possible use of a disguise; the “accuracy of any description [that] the witness gave after observing the incident and before identifying the perpetrator”; the degree to which the witness is confident about the accuracy of his or her identification, subject to the caveat that an “eyewitness’s confidence is generally an unreliable indicator of accuracy”; the extent to which there have been “delays between the commission of a crime and the time an[] identification is made”; and, since “[r]esearch has shown that people may have greater difficulty in accurately identifying members of a different race,” whether the witness and the alleged perpetrator are of the same or different races. In addition, Defendant’s proposed instruction informed the jury that, in considering the reliability of any identification procedure described in the record, the jury should consider whether any person stood “out from

3. The pattern instructions are available in full at http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

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other members of the lineup”; whether a minimum of “six persons or photos” had been included in the lineup; whether the witness viewed the suspect in multiple lineups, since “the risk of mistaken identification is increased” “if a witness views an innocent suspect in multiple identification procedures”; whether the witness identified the suspect in a show-up, since “show ups conducted more than two hours after an event present a heightened risk of misidentification”; whether the line-up administrator knew the suspect’s identity; what was said to the witness prior to viewing a lineup or photographic array; and whether “police officers or witnesses to an event who are not law enforcement officials[] signal to eyewitnesses that they correctly identified the suspect.”

d. Trial Court’s Eyewitness Identification Instruction

The trial court declined to give the eyewitness identification instruction that Defendant requested and, instead, instructed the jury that:

You, ladies and gentlemen, are the sole judges of the credibility and the believability of each and every witness, that is their worthiness of belief. You must decide for yourselves whether to believe the testimony of any witness, or you may believe all or any part or none of what a witness has said on the witness stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you do apply in your own everyday affairs. As applied to this trial, these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrence about which the witness testified; the manner and the appearance of the witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness; whether the witness’s testimony is reasonable and whether such testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given to any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

....

I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the

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crime charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

In addition, the trial court delivered the instruction relating to the manner in which the jury should evaluate the validity of photographic identification procedures as required by N.C. Gen. Stat. § 15A-284.52(d)(3), with this instruction having included a lengthy recitation of the criteria for a proper identification procedure set out in N.C. Gen. Stat. § 15A-284.52(b). We do not believe, given the record developed before the trial court in this case and the content of the instructions actually delivered by the trial court, that the trial court erred by declining to deliver Defendant's requested eyewitness identification instruction.

e. Relevant Appellate Decisions

The appellate courts in this jurisdiction have addressed the appropriateness of delivering additional instructions concerning the credibility of eyewitness identification testimony on a number of occasions. In *State v. Green*, the defendant requested the trial court to instruct the jury to consider the mental state of the witness and the adequacy of the witness' eyesight in evaluating the credibility of the eyewitness identification testimony. 305 N.C. at 475-76, 290 S.E.2d at 633. In lieu of delivering the instruction requested by the defendant, the trial court instructed the jury in accordance with the pattern jury instructions addressing the weight and credibility of the evidence and the necessity for the jury to find beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before returning a verdict of guilty. *Id.* at 476, 290 S.E.2d at 633. In reviewing the defendant's challenge on appeal to the trial court's refusal to deliver his requested instruction, the Supreme Court held that the instructions delivered by the trial court, considered as a whole, were "adequate[] [to] explain[] to the jury the various factors they should consider in evaluating the testimony of witnesses." *Id.* at 477, 290 S.E.2d at 633.

Similarly, in *State v. Dodd*, 330 N.C. 747, 752, 412 S.E.2d 46, 49 (1992), the defendant requested the trial court to instruct the jury in such a manner as to "emphasize[] at length the jury's need to examine the testimony of the witnesses to assess whether they had the opportunity to observe the alleged crime, their ability to identify the perpetrator given the length of time they had to observe, their mental and physical conditions, and the lighting and other conditions that might have affected their observation." Although these instructions focused on a somewhat

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different set of factors than were addressed in the requested instruction at issue in *Green*, the Supreme Court upheld the trial court's decision to refrain from delivering the instruction requested by the defendant and to utilize the pattern jury instructions concerning the weight and credibility of the evidence and the necessity for the jury to find beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before returning a guilty verdict on the grounds that the instructions actually delivered by the trial court adequately informed the jury about the factors that should be considered in evaluating the credibility of eyewitness identification testimony. *Id.* at 753, 412 S.E.2d at 49.

An examination of the Supreme Court's decisions in *Green* and *Dodd*, coupled with our similar decision in *State v. Summey*, 109 N.C. App. 518, 525-26, 428 S.E.2d 245, 249-50 (1993) (holding that the trial court did not err by failing to instruct the jury to consider certain additional factors in evaluating the validity of eyewitness identification testimony), reveals that this Court and the Supreme Court have clearly held that the existing pattern jury instructions governing the manner in which jurors should evaluate the weight and credibility of the evidence and the necessity for the jury to find that the defendant perpetrated the crime charged beyond a reasonable doubt sufficiently address the issues arising from the presentation of eyewitness identification testimony. In recognition of these decisions, Defendant contends that, while the weight, credibility, and identity instructions held to be adequate in *Green* and *Dodd* are sufficient in cases, such as those involving poor lighting, distance, or intoxication, in which the alleged deficiencies in an eyewitness identification should be obvious, they do not suffice to provide jurors with adequate information concerning more subtle and less obvious deficiencies in eyewitness identification evidence. In support of this argument, Defendant relies upon the logic set out in *Henderson*, in which the New Jersey Supreme Court stated, among other things, that, while "[e]veryone knows, for instance, that bad lighting conditions make it more difficult to perceive the details of a person's face," other "findings are less obvious," with many people clearly believing that "witnesses to a highly stressful, threatening event will 'never forget a face' because of their intense focus at the time, the research suggests that is not necessarily so." *Henderson*, 208 N.J. at 272, 27 A.3d at 910. As a result, Defendant essentially argues that we should treat *Green*, *Dodd*, and *Summey* as distinguishable based upon the nature of the factors addressed in the requested instructions deemed unnecessary there.

Assuming, without deciding, that the distinction upon which Defendant relies is a valid one, a point that we need not address in this

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instance, we do not believe that the additional instruction that Defendant requested in this case had adequate evidentiary support. In essence, the difference between the instructions that the trial court delivered and the instruction that Defendant requested is that the latter, unlike the former, contained numerous factual statements about the impact of weapons, focus, stress, racial differences, and the degree of certainty expressed by the witness in identifying the defendant as the perpetrator. For example, the effect of a decision to deliver Defendant's requested instruction would put the trial courts in the position of making numerous factual statements about the impact of various factors on the validity of eyewitness identification testimony, such as assertions that "[t]he process of remembering consists of three stages"; that "research has shown that there are risks of making mistaken identifications"; that "[r]esearch has revealed that human memory is not like a video recording"; that "the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration"; that an "eyewitness's confidence is generally an unreliable indicator of accuracy"; and that "[r]esearch has shown that people may have greater difficulty in accurately identifying members of a different race." Although the record developed in *Henderson* contained evidence relating to these issues, there is no such evidence in the present record and Defendant has not argued, much less established, that we are entitled to take judicial notice of the information upon which the *Henderson* Court relied in adopting the pattern instruction upon which Defendant relies. *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (stating that, "generally a judge or a court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or is *capable of demonstration by readily accessible sources of indisputable accuracy*"). As a result, a decision to reverse the trial court for failing to deliver Defendant's requested instruction relating to the credibility of eyewitness identification testimony would, in essence, put this Court in the position of making factual determinations and exercising rule-making authority, neither of which we have the authority to do. *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, __ N.C. App. __, __, 723 S.E.2d 352, 358 (2012) (holding that "[t]his Court is an error-correcting court, not a law-making court"). As a result, we hold, in light of the previous decisions of the Supreme Court and this Court, by which we are bound; the absence of any evidentiary support for the instruction that Defendant contends that the trial court should have delivered; and the well-established limitations under which this Court operates, that the trial court did not commit prejudicial error by failing to give Defendant's requested instruction concerning the manner in which the

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jury should evaluate the credibility of the eyewitness identification testimony presented for its consideration.

III. Conclusion

Thus, for the reasons set forth above, we conclude that neither of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
THORNE OLIVER WATLINGTON

No. COA13-925

Filed 1 July 2014

1. Appeal and Error—issue decided—companion case

The trial court did not err by refusing to give the jury a requested instruction. Defendant's argument presented the same issue decided against him in *Watlington I*, COA13-661, (filed 1 July 2014).

2. Appeal and Error—preservation of issues—exclusion of expert testimony—basis

An issue concerning the testimony of a fingerprint expert was not preserved for appellate review. Defendant failed to properly move for exclusion of the expert's testimony on the basis that her methods were not reliable.

3. Criminal Law—State's closing argument—improper—new trial not required

The trial court did not commit reversible error by overruling defendant's objections to the State's closing argument. The remarks by the State about a rifle used by an accomplice were improper and should have been precluded by the trial court, but did not require a new trial.

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4. Sentencing—partial retrial—increased sentence—prior record—convictions from first trial

The trial court erred on a partial retrial by increasing defendant's sentence for the charges that were joined at the first trial which resulted in convictions. None of the first trial's convictions could have been used in calculating defendant's prior record level had the jury in the first trial reached guilty verdicts on all of the charges. It would be unjust to punish a defendant more harshly simply because the jury in his first trial could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges.

Appeal by Defendant from judgments entered 30 November 2012 by Judge Henry W. Hight, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 4 February 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General James A. Wellons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders John F. Carella and Benjamin Dowling-Sendor, for Defendant.

McGEE, Judge.

Keith LaMay, Sr. ("LaMay, Sr.") and Keith LaMay, Jr. ("LaMay, Jr.") were robbed at gunpoint in the parking lot of an Arby's restaurant in Burlington at approximately 1:30 a.m. on 30 July 2011. Thorne Oliver Watlington ("Defendant") was tried on six charges related to that robbery at the 25 September 2012 criminal session of Superior Court, Alamance County, along with charges related to other incidents. A jury convicted Defendant of charges unrelated to the Arby's incident on 5 October 2012, found Defendant not guilty of three charges related to the Arby's incident, but was unable to reach a unanimous verdict on three additional charges related to the Arby's incident. The trial court declared a mistrial on the last three charges: two counts of robbery with a firearm and one count of attempted robbery with a firearm. Defendant appealed from the 5 October 2012 judgments, and that appeal is decided in *State v. Watlington*, ___ N.C. App. ___, ___ S.E.2d ___ (2014) ("*Watlington I*") (COA13-661, filed on the same date as this opinion). Defendant was retried on the three remaining charges and was found guilty on all three charges on 30 November 2012. Defendant appeals. A full factual recitation may be found in this Court's opinion in *Watlington I*.

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I.

[1] Defendant contends in his first argument that the trial court erred in refusing to give the jury a requested instruction. We disagree.

Defendant made this same argument in *Watlington I*. In *Watlington I*, this Court found no error in the trial court's decision not to give the instruction Defendant requested. Defendant's argument presents the same issue already decided against Defendant in *Watlington I*. Therefore, in the present case, we must also find no error as related to this issue.

II.

[2] Defendant contends in his second argument that the trial court erred by allowing the State's fingerprint expert to testify, "because her proffered method of proof was an unreliable and untested system[.]" This argument has not been preserved for appellate review.

Lori Oxendine ("Oxendine"), a civilian employee of the Burlington Police Department testified as an expert in fingerprint identification. At trial, Defendant moved to exclude Oxendine's testimony. Defendant's attorney engaged in the following relevant colloquy with the trial court:

MR. CHAMPION: Your Honor, at this time I'd like to renew my motion that I had filed back before the first trial in this action, involving these cases, in which I objected to the scientific basis or reliability of fingerprint testimony.

THE COURT: I've -- you've passed up an article which was reviewed. If you've got any other evidence you would like to show, I'll be more than happy to hear it. I [am] assuming you have some person who's going to get up here and testify that it's not reliable.

MR. CHAMPION: No, sir.

THE COURT: Well, you can cite me to somebody who says it's not reliable and has not been held so in any court in North Carolina or the Fourth District.

MR. CHAMPION: No, Your Honor, I'm just making[]

THE COURT: I understand that. I just want it to be clear for the record what it is.

MR. CHAMPION: No, sir, other than what I've already handed up for the court to review. I just wanted --

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THE COURT: And I want you to know that I'll give you any opportunity you want to put on any person who would challenge that here in front of this [c]ourt, so that we can make a record.

MR. CHAMPION: Yes, sir. I do not have anyone to present.

THE COURT: Okay.

MR. CHAMPION: Out of an abundance of caution, I would be objecting to her qualifications as an expert in fingerprint comparison or identification. I don't know if the Court would want to bring the jury back in to go through preliminaries and then --

THE COURT: Okay. And based upon, if you want to challenge her qualifications now, I'll be more than happy to [do] that in the absence of the jury, you know, give you an opportunity to do that. Although, she's testified in front of us on something earlier, this is a different trial. So I'll be glad to hear you.

Mr. Champion then commenced *voir dire* of Oxendine, and concluded by stating: "No more questions on qualifications." The State then questioned Oxendine, and Mr. Champion declined to question her further. Mr. Champion argued his motion to the trial court, and the trial court responded, as follows:

THE COURT: Okay. I'll be glad to hear you now, but I mean, from what I recall is based upon her 24 years of training and experience or 24 years of experience daily in fingerprint comparison and identification, her prior training, she would appear to qualify to have knowledge to make a comparison and a determination. If you've got something different.

MR. CHAMPION: Your Honor, I, several of the agencies that are, that qualify and certify people, she does not have the qualifications. She's not even aware of their qualifications. She understands that they have some agencies that qualify even including bachelor degrees and some science degree level work. This is considered scientific type evidence, more so than, okay, that's a green shirt versus a green shirt. This is actually looking at microscopic level work, and we just don't feel like she has the, the training

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and educational experience to qualify her as an expert in fingerprint analysis and comparisons.

THE COURT: Thank you, sir. Noted for the record. If she's appropriately qualified in front of the jury, I will accept her.

Although Defendant may have handed some materials to the trial court regarding "the reliability of fingerprint testimony," Defendant did not directly challenge the reliability of fingerprint testimony in general, or more particularly, the reliability of the methods used by Oxendine. Defendant challenged Oxendine's qualifications to testify as an expert in fingerprint analysis, and the trial court made a ruling only on that challenge.

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). "The appellate courts will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Washington*, 134 N.C. App. 479, 485, 518 S.E.2d 14, 17 (1999) (citation omitted).

Because Defendant failed to properly move for exclusion of Oxendine's testimony on the basis that the methods used by Oxendine were not reliable, and because the trial court never ruled on any such motion, that issue is not properly before us. *Id.* This argument is dismissed.

III.

[3] Defendant contends in his third argument that the trial court committed reversible error in overruling Defendant's objections during the State's closing argument. We disagree.

Our Supreme Court has stated:

Counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom, together with the relevant law, in presenting the case to the jury. The trial court is required, upon objection, to censor remarks either not warranted by the law or facts or made only to prejudice or mislead the jury. The conduct

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of the arguments of counsel is left to the sound discretion of the trial judge. In order for defendant to be granted a new trial, the error must be sufficiently grave that it is prejudicial. Ordinarily, an objection to the arguments by counsel must be made before verdict, since only when the impropriety is gross is the trial court required to correct the abuse *ex mero motu*.

State v. Britt, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977) (citations omitted). The portion of the State's closing at issue was as follows:

Ladies and gentlemen, again, Andre McLaughlin [who was also charged in the Arby's incident] has a lot to answer for, but on the, that one incidence, rifle had 14 rounds in it, one for each, actually each one each of you jurors, and –

MR. CHAMPION: Objection.

MR. THOMPSON: -- one to spare.

THE COURT: Go on.

MR. THOMPSON: If [Defendant] had gotten hold of this rifle, this might have been an entirely different kind of case. But be that as it may, he didn't get the rifle, but he did commit a robbery.

I'm not sure if I've been talking 30 minutes or so. I'm not going to take up the whole time.

Mr. Thompson then concluded his closing argument with a few additional statements.

We hold that the remarks by the State were improper, and should have been precluded by the trial court. The trial court then should have given a curative instruction. There was no basis for the State's implication that, had Defendant had the rifle, "this might have been an entirely different kind of case." Furthermore, stating that there was a round for each member of the jury and "one to spare" was clearly inappropriate. Defendant properly objected to the comment concerning "14 rounds," but failed to object to the comment concerning what might have occurred had Defendant had the rifle. There are different standards of review, depending on whether Defendant objected to the argument at trial.

The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing

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to sustain the objection. *See, e.g., State v. Huffstetter*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) (holding that appellate courts will review the exercise of such discretion when counsel's remarks are extreme and calculated to prejudice the jury)[.]

State v. Jones, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citation omitted). If we find the argument was improper, “we [next] determine if the remarks were of such a magnitude that their inclusion prejudiced defendant[.]” *Id.*

However, the standard of review when no objection has been made requires an elevated showing of impropriety.

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Id. at 133, 558 S.E.2d at 107 (citations omitted).

Although we find that these comments were improper, we do not find, pursuant to either appropriate standard, that error requiring a new trial resulted from these comments in the State's closing argument. LaMay, Sr. and LaMay, Jr. both returned to the Arby's parking lot early 30 July 2011, approximately eight hours after the robbery. LaMay, Jr. found an identification card in the woods near the Arby's parking lot, and showed it to LaMay, Sr., who said: “That's the guy that robbed us.” That identification card belonged to Defendant. Law enforcement officers located Defendant in Apartment F of Forestdale Apartments in Burlington, immediately after other individuals involved in the robbery were arrested as they exited Apartment F. When officers knocked on the door of Apartment F, Defendant opened the door, then immediately closed it upon seeing the officers. Defendant has failed in his burden of showing prejudice resulted from the improper statements made by the State in its closing argument.

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IV.

[4] Defendant contends in his final argument that the trial court erred in increasing his sentence based upon his convictions for charges that had been joined for trial with the charges currently before us. We agree.

Before Defendant's first trial, the State moved to join all charges: felonious breaking or entering, felonious larceny, two counts of felonious possession of stolen goods, breaking or entering into a motor vehicle, assault by pointing a gun, possession of a firearm by a felon, two counts of robbery with a firearm, two counts of attempted robbery with a firearm, and possession of a stolen motor vehicle. The first trial concluded on 5 October 2012. Defendant was found guilty on six charges unrelated to the Arby's incident, not guilty on three charges that were related to the Arby's incident, but the jury could not reach a unanimous verdict on three additional charges related to the Arby's incident: two counts of robbery with a firearm and one count of attempted robbery with a firearm. A mistrial was declared on those charges. Defendant was retried, and found guilty on all three charges on 30 November 2012. Defendant's prior record level was calculated using the judgments entered 5 October 2012, and Defendant was sentenced, based upon the trial court's finding him to be a prior record level III.

In the present case, Defendant argues it was improper for the trial court to use the 5 October 2012 convictions in calculating his prior record level because those charges had been consolidated with the charges that resulted in the 30 November 2012 convictions, and the only reason Defendant ended up being convicted on those charges on a different day was the inability of the first jury to reach a unanimous verdict.

It is clear that, had the jury in the first trial reached guilty verdicts on these three charges as well, none of the 5 October convictions could have been used when calculating Defendant's prior record level. N.C. Gen. Stat. § 15A-1340.14(d) states: "**Multiple Prior Convictions Obtained in One Court Week.**— For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14(d) (2013). We have noted:

Nothing within the Sentencing Act specifically addresses the effect of joined charges when calculating previous convictions to arrive at prior record levels. We agree . . . that the assessment of a defendant's prior record level using joined convictions would be unjust and in contravention

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of the intent of the General Assembly. *See State v. Jones*, 353 N.C. 159, 170, 538 S.E.2d 917, 926 (indicating that “[w]hen interpreting statutes, this Court presumes that the legislature did not intend an unjust result”).

Further, “the ‘rule of lenity’ forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.”

State v. West, 180 N.C. App. 664, 669-70, 638 S.E.2d 508, 512 (2006) (citations omitted). It would be unjust to punish a defendant more harshly simply because, in his first trial, the jury could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges. There is no policy reason that would support such a result and, because the General Assembly has not clearly stated an intention to allow for harsher punishments in such situations, we hold the “rule of lenity” forbids such a construction of the sentencing statutes. *Id.* We reverse and remand for resentencing consistent with our holding.

No error in part, dismissed in part, reversed and remanded in part.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA
v.
ERIC DONOVAN MASSENBURG

No. COA13-1434

Filed 1 July 2014

1. Jury—unanimous verdict—Allen charge—substantial compliance with statute

The trial court did not commit plain error in a felonious breaking or entering and assault inflicting serious bodily injury case by failing to properly instruct the jury of its duty to make reasonable efforts to reach a unanimous verdict. Although the trial court’s *Allen* charge failed to state the words of N.C.G.S. § 15A-1235(b)(3) verbatim, the charge was in substantial compliance with N.C.G.S. § 15A-1235.

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2. Sentencing—special probation—presumptive range—no abuse of discretion

The trial court did not abuse its discretion in a felonious breaking or entering and assault inflicting serious bodily injury case by imposing a term of special probation of 135 days in the Division of Adult Correction instead of regular probation. The sentence imposed was within the presumptive range and the record did not show that the sentence was discriminatory based on poverty.

Appeal by defendant from judgment entered 10 May 2013 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 22 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

BRYANT, Judge.

Where the trial court's *Allen* charge to the jury was in substantial compliance with N.C. Gen. Stat. § 15A-1235, there was no coercion of the jury verdict. Where the sentence imposed was within the presumptive range, the trial court did not abuse its discretion by imposing an intermediate sanction of special probation.

On 10 December 2012, defendant Eric D. Massenburg was indicted on charges of felonious breaking or entering and assault inflicting serious bodily injury. The matter was brought to trial during the 7 May 2013 session in Wake County Superior Court, the Honorable G. Wayne Abernathy, Judge presiding.

The evidence presented at trial tended to show that on the evening of 23 September 2012, defendant accompanied his mother Henrietta Massenburg to the home of defendant's ex-sister-in-law Patricia Massenburg. Then, defendant left. Patricia's boyfriend Joe Perry was at the residence. Henrietta called defendant after Joe began cursing at her and ordering her to leave. When defendant returned to the residence, Joe brandished a butcher's knife. Though testimony differed as to whether Joe put the knife down prior to the time defendant began hitting him, the testimony was consistent in showing that defendant punched Joe repeatedly. Due to defendant's assault, Joe spent three days in the hospital, lost several of his teeth, and had a plate inserted into his jaw.

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At the close of the evidence, the charge of felonious breaking and entering was dismissed but the State was allowed to proceed on the charge of misdemeanor breaking or entering. The trial court instructed the jury on misdemeanor breaking or entering and assault inflicting serious bodily injury. At five o'clock, after a few hours of deliberation, the jury advised the court that it had reached a unanimous verdict on the charge of breaking or entering but could not agree on the assault inflicting serious bodily injury charge and did not feel they would reach a unanimous verdict with more time. The court emphasized to the jury that it was their duty to reach a verdict if they could do so without surrendering their honest convictions, then instructed the jury that deliberations would resume the following morning.

The next day, the jury returned a verdict of guilty on the charge of assault inflicting serious bodily injury and a verdict of not guilty on the charge of misdemeanor breaking or entering. Defendant appeals.

On appeal, defendant raises the following two arguments: the trial court (I) erred in failing to properly instruct the jury; and (II) abused its discretion in sentencing defendant to an active term of imprisonment.

I

[1] Defendant argues that after receiving notice that the jury was deadlocked, the trial court erred in failing to properly instruct the jury of its duty to make reasonable efforts to reach a unanimous verdict pursuant to General Statutes, section 15A-1235, also known as an *Allen* charge,¹ and as a result, the jury's guilty verdict was coerced. We disagree.

Initially, we note that defendant failed to preserve this issue for review as he failed to object to the trial court's jury instruction that he now challenges. *See* N.C. R. App. P. 10(a)(2) (2014) (objection required

1. *Allen v. United States*, 164 U.S. 492, 501-02 (1896) (finding no error in trial court's reinstruction to jury where jury could not reach a unanimous verdict. The Supreme Court reasoned that "[w]hile, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.").

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to allow appeal of a jury charge); *see also State v. Storm*, ___ N.C. App. ___, ___, 743 S.E.2d 713, 716 (2013) (Where the defendant failed to object to the trial court's instruction and did not object after the trial court's instruction, the challenge was not properly preserved.). Therefore, we review this matter for plain error.² *See State v. Williams*, 315 N.C. 310, 328, 338 S.E.2d 75, 86 (1986) (reviewing the defendant's challenge to the trial court's *Allen* charge based on a failure to comply with General Statutes, section 15A-1235 for plain error where the defendant failed to preserve his argument at trial).

"[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted); *see generally State v. Conley*, ___ N.C. App. ___, ___, 724 S.E.2d 163, 169, *disc. review denied*, 366 N.C. 238, 731 S.E.2d 413 (2012) ("Where trial counsel fails to object to the trial court's instructions in response to a question from the jury seeking clarification, we review for plain error."). "Preserved legal error is reviewed under the harmless error standard of review. Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error." *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (citations 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.

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

Pursuant to North Carolina General Statutes, section 15A-1235, "[i]f it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b)." N.C. Gen. Stat. § 15A-1235(c) (2013).

(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

2. Defendant cites to *State v. May*, ___ N.C. App. ___, 749 S.E.2d 483 (2013), for the proposition that this issue is subject to harmless error analysis as opposed to plain error. We note, however, that our Supreme Court has granted a stay as to *May*. We therefore do not use it as a basis for our standard of review or analysis of this issue.

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(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

Id. § 15A-1235 (a), (b).

Defendant contends that the trial court's *Allen* charge failed to instruct the jury in accordance with section 15A-1235(b)(3), "a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous[,]" and because of this omission, he is entitled to a new trial. We disagree.

In *Williams*, 315 N.C. 310, 338 S.E.2d 75, the defendant argued that the trial court's *Allen* charge failed to comply with General Statutes, section 15A-1235(b)(3) and (4). The Court reasoned that "whenever the trial judge gives the jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), whether given before the jury initially retires for deliberation or after the trial judge concludes that the jury is deadlocked, he must give all of them." *Id.* at 327, 338 S.E.2d at 85.

Since the trial judge gave the instruction after forming the opinion that the jury was deadlocked, he committed error when he gave the instructions set out in N.C.G.S. § 15A-1235(b)(1) and (2), but failed to give the instructions set out in N.C.G.S. § 15A-1235(b)(3) and (4).

This error does not, however, automatically entitle the defendant to a new trial.

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Id. at 327, 338 S.E.2d at 86. In *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997), our Supreme Court reasoned as follows:

[t]he trial court's instructions did not suggest that jurors should surrender their beliefs or include extraneous references to the expense and inconvenience of another trial, as has been found erroneous by this Court.

Moreover, by comparing the trial court's instructions with those contained in Section 15A-1235 above, it is clear that the trial court's instructions contained the substance of the statutory instructions. The instructions fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict.

Id. at 22-23, 484 S.E.2d at 363-64 (citations omitted).

Here, the trial court gave the following charge:

THE COURT: Ladies and gentlemen, I want to emphasize to you the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and reconcile your differences if you can without surrendering any conscientious convictions. No juror should surrender his honest convictions as to the weight or the effect of the evidence solely because the opinion of a fellow juror or for the mere purpose of returning a verdict. Each of you must decide this case for yourself with impartial consideration [of] the evidence. Y'all have a duty to consult with one another and to deliberate with the view of reaching an agreement if it can be done without injury to your personal judgment.

We acknowledge that the trial court's charge fails to state the words of section 15A-1235(b)(3) verbatim. However, it is clear that the trial court's instructions contain the substance of General Statutes, section 15A-1235(b). Moreover, we again note that based on *Fernandez*, the substance of the instruction "fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict." *Id.* at 23, 484 S.E.2d at 364; *see also State v. Gettys*, ___ N.C. App. ___, ___, 724 S.E.2d 579, 586 (2012) (reviewing for plain error the trial court's *Allen* charge). Accordingly, we overrule defendant's argument.

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II

[2] Next, defendant argues the trial court abused its discretion and violated the Equal Protection Clause of both the United States and North Carolina constitutions by choosing to impose upon defendant a term of special probation of 135 days in the Division of Adult Correction as an intermediate sanction. Specifically, defendant argues the trial court chose a sentence with active time as opposed to regular probation because defendant would “never make [enough] money working . . . to pay back taxpayers for the cost of Medicaid.” We disagree.

“In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.” *Griffin v. Illinois*, 351 U.S. 12, 17, 100 L. Ed. 891, 898 (1956). “If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant’s rights.” *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (citation and quotation omitted). “‘A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.’” *State v. Cameron*, 83 N.C. App. 69, 76, 349 S.E.2d 327, 332 (1986) (quoting *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962)).

Here, after hearing from defendant who requested a mitigated-range sentence of 11 to 23 months with a short active sentence, and the State’s request of a presumptive range sentence, the trial court imposed a presumptive range sentence of 19-32 months. The sentence contained an intermediate sanction – a term of special probation of 135 days in the Division of Adult Correction. The trial court then gave the following basis for the sentence imposed:

THE COURT: . . . Well, I noticed that the Defendant has three prior breakings and possession of schedule six and possession of a firearm with obliterated serial number. That, of course, is of concern. What bothers me is that he has probation violations six times for the same offense. In a perfect world, I would leave him on probation, make him pay back the taxpayers who probably paid \$50-\$75,000 in Medicaid damage he did to this man’s head. But he won’t make probation. He won’t make it in the sense he’ll never make the money working at McDonald’s to pay back the taxpayers for the cost of Medicaid.

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It does appear to me that the force was clearly excessive in this case But regardless, I think the jury has spoken. I believe they've spoken correctly.

Stand up, please, [defendant]. The lawyers are right, the range of sentences provided to me to choose from by the legislature range from a minimum of 11 months to a maximum of about 32 months in the presumptive range, and they also allow for suspension. I want you to realize you sentenced the victim in this case to a lifetime of a plate in his jaw and only half the teeth in his head, so he doesn't ever get over this.

How much time is he doing in federal?

. . .

[Defense counsel]: He's got 24 months, additional months, he's pulling everyday.

THE COURT: Well, I'll take into consideration the fact he's going to be in prison for 24 months in the federal system as a result of this violation, this conviction. Rather than your straight active sentence which was my inclination, which I would do if he did not have the 24 months facing him, which he will serve.

. . .

I was going to sentence him at the bottom of the presumptive and make it all active. What I think I'm going to do is move – that was my thought process, maybe move to the top of the presumptive and give him some suspension.

In this case, madam clerk, the Defendant admits that he has five points for felony sentencing purposes, which makes him a level two. This is a class F felony. It is the judgment of the Court that the Defendant be imprisoned in the [Division] of Adult Corrections for Male Prisoners for a minimum of [19] months and a maximum of [32] months; however, in view of the fact he is going to be in prison for 24 months in the federal system, the Court is going to suspend all but [four months and 15 days (135 days)], and he's placed on supervised probation for 24 months on the condition that he have no contact with the victim or any witnesses for the State.

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It appears the trial court's reference to a sentence of probation was intended as consideration of an exceptional circumstance – “[i]n a perfect world, I would leave him on probation, make him pay back the taxpayers who probably paid \$50-\$75,000 in Medicaid damage.” However, the trial court's sentence could be considered lenient by most accounts: Defendant was a Level II offender convicted of a violent Class F felony, sentenced in the presumptive range, but given a special probationary sentence of 135 days in the Division of Adult Correction, as opposed to a straight active sentence. Defendant was also serving or about to serve an active sentence in the federal system. On this record, defendant cannot show that the sentence ordered by the court was a discriminatory sentence predicated on poverty. The trial court did not abuse its discretion, engage in procedural conduct prejudicial to defendant, operate in circumstances manifesting an inherent unfairness and injustice, or engage in conduct offensive to a sense of fair play. *See Cameron*, 83 N.C. App. at 76, 349 S.E.2d at 332. Defendant's argument is overruled.

No error.

Judges HUNTER, Robert C., and STEELMAN concur.

SWAN BEACH COROLLA, L.L.C., OCEAN ASSOCIATES, LP, LITTLE NECK TOWERS, L.L.C., GERALD FRIEDMAN, NANCY FRIEDMAN, CHARLES S. FRIEDMAN, TIL MORNING, LLC, AND SECOND STAR, L.L.C., PLAINTIFFS

v.

COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; AND JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY, J. OWEN ETHERIDGE, PAUL MARTIN, AND S. PAUL O'NEAL AS MEMBERS OF THE CURRITUCK COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA13-1272

Filed 1 July 2014

1. Zoning—vested rights claim—exhaustion of administrative remedies—not required

Plaintiffs were not required to exhaust administrative remedies before the Currituck County Board of Adjustment in order to bring this civil action and the trial court erred by dismissing their common law vested rights claim under N.C.G.S. § 1A-1, Rule 12(b)(1). A plaintiff is not required to request that a board of adjustment issue a variance that it does not have the authority to issue.

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2. Zoning—common law vested rights—statement of claim—sufficient

Plaintiffs' claim of common law vests rights in developing property was sufficiently pled to survive a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). Taking plaintiff's allegations as true, their clearing of lots, canal digging, dune building, and road grading were substantial expenditures, their property was not zoned at the time they made their expenditures, and their expenditures were made in good faith.

3. Civil Rights—§ 1983—development of land—failure to exhaust administrative remedies—sovereign immunity—statute of limitations

The trial court erred by dismissing plaintiffs' claims under 42 U.S.C. § 1983 because these claims were not barred by state law sovereign immunity or failure to exhaust administrative remedies. Defendants did not preserve a statute of limitations issue for appeal because they did not argue the statute of limitations at the motion hearing and it was not clear that they obtained a ruling on the issue.

4. Zoning—state constitution—tax classification—claim dismissed

The trial court did not err in a zoning case by dismissing plaintiffs' allegations under Article V, Section 2 of the North Carolina Constitution that the County had refused to allow business development on property that it had classified as business property for tax purposes. Plaintiffs did not challenge the tax classification or the uniformity of the tax rules. The tax classification of plaintiffs' property might be relevant to the "good faith" element of their vested rights claim, but their allegations were insufficient to state a claim under Article V, Section 2 of the North Carolina Constitution.

Appeal by plaintiffs from Order entered 24 July 2013 by Judge Wayland J. Sermons in Superior Court, Currituck County. Heard in the Court of Appeals 24 April 2014.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Lacy H. Reaves and J. Mitchell Armbruster, for plaintiffs-appellants.

County of Currituck, by Donald I. McRee, Jr., for defendants-appellees.

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STROUD, Judge.

Plaintiffs appeal from an order entered 24 July 2013 dismissing their complaint for declaratory judgment regarding vested rights they claimed to develop their property commercially, for violations of constitutional rights under 42 U.S.C. § 1983, and for violation of Article V, Section 2 of the North Carolina Constitution. We reverse in part, affirm in part, and remand for further proceedings.

I. Background

Plaintiffs are five companies and three individuals who own property in the Swan Beach Subdivision in Currituck County. On 6 July 2012, they filed a complaint against the County of Currituck, the Currituck Board of Commissioners, and the commissioners themselves in their official capacities. Plaintiff Ocean Associates was the original developer of the land and the other plaintiffs purchased their land from it.¹ They alleged that they have common law vested rights to develop commercial uses on their property. They also raised claims of laches, “easement rights” to commercially develop their property, state constitutional violations, and violations of federal equal protection and due process under 42 U.S.C. § 1983.

According to the complaint, plaintiff Ocean Associates, LP, purchased approximately 1400 acres of property in the Carova Beach area of Currituck County in 1966 to develop a residential subdivision along with related commercial services.² In 1969, Ocean Associates created and recorded a plat indicating that it intended to divide the property into residential and business lots. At the time, Currituck County had no applicable zoning ordinance. However, the County asked Ocean Associates to refrain from developing the business lots until the residential lots were sufficiently occupied. After filing the plat, Ocean Associates began to prepare both the residential and business lots for development. They spent \$425,050.00 on services such as surveying, land geosciences, general engineering, road grading, canal digging, dune building, filling lots, evacuating ditches, and landscaping. This infrastructure would serve both the business and residential lots.

1. The precise nature of the relationship between Ocean Associates and the other plaintiffs is not clear from the complaint.

2. Because this case comes to us on a motion to dismiss, all of the following facts are from the complaint; we express no opinion as to their veracity.

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In 1971, Currituck County adopted a zoning ordinance. The 1971 ordinance designated plaintiffs' property as RA-20. The RA-20 district allowed for low density residential and agricultural uses with only limited business uses. Plaintiffs allege that they did not know that the zoning of their property had changed. In 1975, the County enacted a new zoning ordinance. This ordinance zoned plaintiffs' property in a similar manner to the previous ordinance. Plaintiffs believed that the County would still permit them to develop their property for commercial uses because the County had allowed other property owners to do the same.

In 1989, Currituck County enacted a Unified Development Ordinance (UDO). The UDO zoned plaintiffs' property RO2, which does not allow business uses except for marinas, campgrounds, outdoor recreational facilities, and small professional offices. The business and commercial uses intended by plaintiffs would not be permitted under this ordinance. Nevertheless, plaintiffs continued to believe that they would be allowed to commercially develop their property.

In 2004, plaintiffs decided to move forward with development of the business lots because the density of the residential lots had finally become sufficient to support such use. They wanted to build a convenience store, real estate offices, a post office, and a restaurant. Around September 2004, the County informed plaintiffs that such uses would not be permitted. Plaintiffs asserted that they had vested rights to use their property in this manner, but the County disagreed, asserting that the UDO barred such uses. Over the next three years, plaintiffs then attempted to convince the County to rezone their property so that they could develop their property for business uses. The parties agreed that such uses would not be permitted on their property under the UDO.

Plaintiffs allege that despite the County's assertion that the UDO prohibits business development in the RO2 district, the County has permitted other businesses to operate in the area. They alleged that the County treated plaintiffs differently without a rational basis, or because the individual plaintiffs are Jewish.

On 12 September 2012, defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). Defendants argued that plaintiffs failed to exhaust applicable administrative remedies and that they are protected by sovereign, governmental, and legislative immunity. They further argued that plaintiffs' complaint is barred by the applicable statutes of limitations.

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Plaintiffs filed an amended complaint on 13 February 2013. The amended complaint added an allegation that the County adopted a zoning ordinance in 1968, but that there was no map accompanying the ordinance and that their property was not zoned at that time. The amended complaint also added a claim under Article V, Section 2 of the North Carolina Constitution. Plaintiffs alleged that the County had taxed their property as business property since 1969, so its failure to permit plaintiffs to develop their property for business uses contravenes the requirement of taxation by uniform rule.

Defendants then filed an amended motion to dismiss and an amended brief in support of their motion. The motion was heard by the superior court on 20 May 2013. By order entered 24 July 2013, the superior court allowed defendants' 12(b)(1) motion to dismiss for failure to exhaust administrative remedies and their 12(b)(6) motion for failure to state a claim, though it did not specify a reason. Plaintiffs timely appealed to this Court.

II. Standard of Review

Defendants moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1)(2011) and for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)(2011).

Rule 12(b)(1) permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy. We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction *de novo* and may consider matters outside the pleadings. Pursuant to the *de novo* standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Trivette v. Yount, ___ N.C. App. ___, ___, 720 S.E.2d 732, 735 (2011) (citations, quotation marks, brackets, and italics omitted).

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals

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that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A., ___ N.C. App. ___, ___, 752 S.E.2d 661, 663-64 (2013) (citation and quotation marks omitted).

III. Common Law Vested Rights Claim

[1] Plaintiffs argue that the trial court erred in dismissing their common law vested rights claim under Rule 12(b)(1) for failure to exhaust administrative remedies. Defendants counter that even if it was error to dismiss under Rule 12(b)(1), dismissal was proper under Rule 12(b)(6). We hold that plaintiffs did not fail to exhaust administrative remedies and that their common law vested rights claim was sufficiently pled to survive a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6).

A. Exhaustion of Administrative Remedies

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). "If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed." *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004). Nevertheless, "a party need not exhaust an administrative remedy where the remedy is inadequate." *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002). Facts justifying avoidance of administrative procedure must be pled in the complaint. *Id.* at 534, 571 S.E.2d at 58.

"The [administrative] remedy is considered inadequate unless it is calculated to give relief more or less commensurate with the claim." *Jackson for Jackson v. North Carolina Dept. of Human Resources*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 904 (1998) (citation and quotation marks omitted), *disc. rev. denied*, 350 N.C. 594, 537 S.E.2d 213 (1999). Generally, constitutional claims are not subject to administrative remedies, so failure to pursue such remedies is not fatal to those claims.

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See Meads v N.C. Dep't of Agric., 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1988); *Hardy ex rel. Hardy v. Beaufort County Bd. of Educ.*, 200 N.C. App. 403, 409, 683 S.E.2d 774, 779 (2009).³

Here, plaintiffs specifically pled that they were not required to exhaust administrative remedies and that the administrative remedies are inadequate. Nevertheless, we must consider whether the facts as pled justify failure to exhaust administrative procedures. We hold that plaintiffs sufficiently pled futility because the Currituck County Board of Adjustment would not be authorized to hear plaintiffs' common law vested rights claim.

The 'vested rights' doctrine has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances. A determination of the 'vested rights' issue requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures.

Huntington Properties, LLC v. Currituck County, 153 N.C. App. 218, 226, 569 S.E.2d 695, 701 (2002) (citations, quotation marks, and brackets omitted).

"In reviewing the determination of an administrative enforcement officer pursuant to N.C. Gen. Stat. § 160A-388, a board of adjustment sits in a 'quasi-judicial capacity' and has only the authority it is granted under that statute." *Dobo v. Zoning Bd. of Adjustment of City of Wilmington*, 149 N.C. App. 701, 706, 562 S.E.2d 108, 111 (2002), *rev'd in part on other grounds*, 356 N.C. 656, 576 S.E.2d 324 (2003). N.C. Gen. Stat. § 160A-388(b) (2011) authorizes boards of adjustment to "hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance." Its role is solely related to the interpretation of the ordinances and deciding whether to grant a variance from those ordinances. *See Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986). Boards of adjustment do not have the authority to adjudicate constitutional claims. *Id.*; *Dobo*, 149 N.C. App. at 706, 562 S.E.2d at 111.

3. Exhaustion may be required for procedural due process claims. *See Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 435, 471 S.E.2d 342, 347 (1996), *cert. denied*, 519 U.S. 1112, 136 L.Ed. 2d 839 (1997); *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010).

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Some common law vested rights cases have been appealed from boards of adjustment⁴; others have been brought as civil actions without prior administrative proceedings.⁵ These cases do not announce a clear rule for the proper method to pursue a vested rights claim. Nevertheless, a rule can be inferred from the appellate courts' treatment of those cases and the statutory authority of boards of adjustment discussed above. Our Supreme Court has differentiated between interpretations of zoning ordinances, which are properly considered by boards of adjustment, and constitutional challenges, which are not. See *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 661-62 (holding that it was error to join a claim concerning the interpretation of development ordinances with constitutional challenges thereto), *cert. denied*, 496 U.S. 931, 110 L.Ed. 2d 651 (1990). We have noted that where interpretation of an ordinance is involved the property owner should follow the administrative procedure of seeking permission for a nonconforming use from the board of adjustment. See *Huntington Properties, LLC*, 153 N.C. App. at 227, 569 S.E.2d at 702; see also *Kirkpatrick*, 138 N.C. App. at 87-88, 530 S.E.2d at 343-44 (considering a common law vested rights claim in a case first brought to the board of adjustment, along with issues concerning interpretation of the ordinances). However, the discretion of a board of adjustment is not unlimited. Its "power to 'determine and vary' is limited to such variations and modifications as are in harmony with the general purpose and intent of the ordinance and do no violence to its spirit." *Lee v. Board of Adjustment of City of Rocky Mount*, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (1946). A plaintiff is not required to request that the board of adjustment issue a variance that it does not have the authority to issue. See *Smith*, 276 N.C. at 57, 170 S.E.2d at 911.

Where the interpretation of the ordinance is not at issue, the ordinance prohibits the property owner's intended use, and the property owner is claiming a common law vested right to such a nonconforming use, the only claim is a constitutional one. In such a case, plaintiffs are not required to first exhaust the procedures before the board of adjustment. Here, as in *Smith*, plaintiffs' "contention is that they have a legal

4. See, e.g., *Application of Campsites Unlimited, Inc.*, 287 N.C. 493, 215 S.E.2d 73 (1975), *Browning-Ferris Industries Of South Atlantic, Inc. v. Guilford County Bd. of Adjustment*, 126 N.C. App. 168, 484 S.E.2d 411 (1997), *Kirkpatrick v. Village Council for Village of Pinehurst*, 138 N.C. App. 79, 530 S.E.2d 338 (2000).

5. See, e.g., *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969), *Russell v. Guilford County*, 100 N.C. App. 541, 397 S.E.2d 335 (1990), *MLC Automotive, LLC v. Town of Southern Pines*, 207 N.C. App. 555, 702 S.E.2d 68 (2010), *disc. rev. denied*, 365 N.C. 211, 710 S.E.2d 2 (2011).

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right to build, which right the city cannot take from them and for which no permit is authorized by the ordinance. . . . [T]he law does not require them to make a vain trip to the City Hall before exercising it.” *Id.* at 57, 170 S.E.2d at 911. Plaintiffs specifically alleged that the meaning of the UDO was not in dispute and that their desired use was not allowed under the ordinance.

Therefore, we conclude that plaintiffs were not required to exhaust administrative remedies before the Currituck County Board of Adjustment in order to bring the present civil action. The trial court erred in dismissing plaintiffs’ vested rights claim under Rule 12(b)(1) for failure to exhaust administrative remedies.

B. Sufficiency of Claim

[2] Next, we must consider whether plaintiffs’ common law vested rights claim was sufficiently pled to state a cause of action. We hold that plaintiffs sufficiently pled their common law vested rights claim to survive a motion to dismiss.⁶

A party’s common law right to develop and/or construct vests when: (1) the party has made, prior to the [enactment or] amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party.

Browning-Ferris, 126 N.C. App. at 171-72, 484 S.E.2d at 414 (citations and quotation marks omitted).

“[W]hen a property owner makes expenditures in the absence of zoning . . . , subsequent changes in the zoning of the property may not prohibit the resulting nonconforming use.” *Finch v. City of Durham*, 325 N.C. 352, 366, 384 S.E.2d 8, 16 (1989). A property owner need not rely on the existence of a permit authorizing construction if none was

6. This case involves only common law vested rights; plaintiffs do not assert statutory vested rights under N.C. Gen. Stat. § 160A-385.1.

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required at the time the expenditures were made. *MLC Automotive, LLC*, 207 N.C. App. at 565, 702 S.E.2d at 75. “To acquire such vested property right[s] it is sufficient that, prior to the . . . enactment of the zoning ordinance and with the requisite good faith, he make a substantial beginning of construction and incur therein substantial expense.” *Campsites Unlimited*, 287 N.C. at 501, 215 S.E.2d at 78 (citation and quotation marks omitted). “A party acts in good faith reliance when it has an honest belief that the nonconforming use would not violate declared public policy.” *Kirkpatrick*, 138 N.C. App. at 87, 530 S.E.2d at 343 (citation, quotation marks, and brackets omitted).

As we are considering a 12(b)(6) motion to dismiss, we must assume that the facts alleged by plaintiffs are true and liberally construe the complaint. *Mosteller v. Duke Energy Corp.*, 207 N.C. App. 1, 11, 698 S.E.2d 424, 431 (2010), *disc. rev. denied*, 365 N.C. 211, 710 S.E.2d 38 (2011). The relevant allegations are as follows:

In 1966, plaintiffs or their predecessors in interest acquired approximately 1400 acres of property in Currituck County. The property was not then zoned and commercial development was allowed. In June 1966, the County adopted a “Subdivision Ordinance.” On 2 September 1969, consistent with this ordinance, Plaintiff Ocean Associates recorded a plat showing 577 residential lots and six business areas on the property. Such commercial uses were permitted in that area at the time. The County asked that the commercial development not begin until there was sufficient residential density in the area to support the businesses and plaintiffs agreed. Plaintiffs began development in 1969. Between 1968 and 1971, plaintiffs spent approximately \$425,050.00 to prepare both the residential and the business lots. These expenditures included general engineering, land geosciences, road grading, canal digging, dune building, lot filling, evacuating ditches, landscaping, and surveying. Plaintiffs would not have expended these funds “but for the fact that business and commercial uses were permitted on the Property under County law . . .” In the early 1970s, plaintiffs completed the infrastructure that would serve both the business and residential lots.

In October 1971, Currituck County adopted a zoning ordinance and prepared a map. The map seemed to designate the property as “RA-20.” The RA-20 district permitted mostly low density residential and agricultural uses, with only limited business or commercial uses. The County adopted a second zoning ordinance in 1975, which seemed to continue designating plaintiffs’ property as RA-20. The County assured property owners that subdivisions approved prior to adoption of these ordinances would continue to be allowed.

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In 1989, the County adopted a UDO, which is still in effect. Although unclear, plaintiffs' property was apparently zoned RO2. The RO2 district allows only limited business uses. Plaintiffs' planned uses for the property are not allowed under the UDO. Plaintiffs moved forward with further development of the business lots in 2004. The County informed plaintiffs that their intended uses were not permitted under the UDO and denied that plaintiffs had any vested rights to use their property in that manner.

Taking these facts as true, we hold that plaintiffs sufficiently pled their claim for common law vested rights to survive a motion to dismiss. Plaintiffs have alleged that their property was not zoned at the time they made their expenditures to prepare the business lots. They have alleged that this use was lawful at the time the expenditures were made and that the expenditures were made in good faith reliance on that fact. They have alleged that they expended over \$400,000 on the development. They allege that they are prejudiced by the zoning ordinance because their intended commercial use would not be permitted under the ordinance.

In *Campsites Unlimited*, our Supreme Court held that the property owners had a vested right because they made substantial expenditures in reliance on the lack of zoning. 287 N.C. at 502, 215 S.E.2d at 78. In that case, the property owners had cleared and constructed roadways and staked out lots. *Id.* The alleged construction activities here were at least as substantial as those in *Campsites Unlimited*, if not more. Plaintiffs' clearing of the lots, canal digging, dune building, and road grading were intended to prepare the site for development. *Cf. Russell*, 100 N.C. App. at 545, 397 S.E.2d at 337 (holding that the plaintiff's expenditures were not substantial where there was "no evidence of ground breaking, tree clearing or anything else done to prepare the site for development"). We conclude that these expenditures were "substantial."

Additionally, taking the allegations of the complaint as true, plaintiffs' reliance on the lawfulness of their project was in good faith. The required "good faith"

is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

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Campsites Unlimited, 287 N.C. at 503, 215 S.E.2d at 79 (citation and quotation marks omitted).

Here, plaintiffs filed plats indicating business development before any zoning ordinance was in place. There is no indication that they were aware of any plans to zone their property such that business development would not be allowed. *Cf. id.* The face of the complaint does not reveal that plaintiffs failed to acquire any other permits required to begin construction. *Cf. Browning-Ferris*, 126 N.C. App. at 172, 484 S.E.2d at 414. Indeed, plaintiffs have alleged that the County was aware of their plans and condoned them.

In sum, plaintiffs' allegations, if true, show that they have made substantial expenditures in good faith reliance on the lack of zoning at the time the expenditures were made. We conclude that plaintiffs have sufficiently pled a common law vested rights claim. Accordingly, we hold that the trial court erred in allowing defendants' motion to dismiss under Rule 12(b)(6).⁷

IV. Equal Protection and Due Process § 1983 Claims

[3] Plaintiffs next argue that the trial court erred in dismissing their equal protection and substantive due process claims under 42 U.S.C. § 1983 (2006) for failure to exhaust administrative remedies and sovereign immunity.⁸ Although the basis for its decision is not clear from the trial court's order, defendants moved to dismiss plaintiffs' § 1983 claims on the basis of failure to exhaust administrative remedies, sovereign immunity, and legislative immunity. Defendants did not argue at the motion hearing that the § 1983 claim was improperly pled or that the claims would be barred by the statute of limitations. On appeal, defendants do not argue that they are immune.

"To state a claim under 42 U.S.C. § 1983, a plaintiff must show that [a person], acting under color of law, has 'subjected [him] to the deprivation of any rights, privileges, or immunities secured by the Constitution

7. There was a question raised at oral arguments concerning whether the plaintiffs other than Ocean Associates could bring a vested rights claim as successors in interest even though they did not actually expend the funds themselves. The individuals involved with the property are apparently the same, but the corporate forms have changed. This issue was not raised in the pleadings, briefed by the parties, or addressed by the trial court, so we express no opinion on that question.

8. Defendants did not argue to the trial court and do not argue on appeal that plaintiffs failed to allege any element of these claims.

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and laws.’” *Copper*, 363 N.C. at 789, 688 S.E.2d at 429 (quoting 42 U.S.C. § 1983 (2006)). “[A] municipality is a ‘person’ within the meaning of section 1983.” *Moore v. City of Creedmoor*, 345 N.C. 356, 365, 481 S.E.2d 14, 20 (1997).

Plaintiffs alleged that the County has allowed other similarly situated property owners to operate businesses in the zoning districts that prohibit commercial buildings while denying plaintiffs the opportunity to do the same. They have alleged that the County treated them differently because they are Jewish. Moreover, plaintiffs allege that the County’s decision to treat them differently was arbitrary and without any rational relationship to a valid governmental objective. They allege that they have been damaged by this discrimination because they have lost income they could have received from the commercial development of their property. All of the claims were brought against the County itself and the individual County Commissioners in their official capacity.

First, plaintiffs’ § 1983 claims may not be dismissed for failure to exhaust administrative remedies. While claims for violation of procedural due process may be subject to exhaustion requirements, *Copper*, 363 N.C. at 789-90, at 688 S.E.2d at 430, substantive constitutional claims are not, *Edward Valves, Inc.*, 343 N.C. at 435, 471 S.E.2d at 347. Here, plaintiffs’ claims are founded on substantive due process and equal protection. They were not required to exhaust any administrative process to bring these claims. *See Edward Valves, Inc.*, 343 N.C. at 435, 471 S.E.2d at 347.

Second, defendants are not protected from § 1983 claims on the basis of sovereign immunity. *Corum v. University of North Carolina Through Bd. of Governors*, 330 N.C. 761, 772, 413 S.E.2d 276, 283 (“[S]overeign immunity alleged under state law is not a permissible defense to section 1983 actions.”), *disc. rev. denied*, 506 U.S. 985, 121 L.Ed. 2d 431 (1992); *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 627, 538 S.E.2d 601, 616 (2000) (noting that “a municipal entity has no claim to immunity in a section 1983 suit” (citation and quotation marks omitted)), *disc. rev. denied*, 353 N.C. 372, 547 S.E.2d 811 (2001). Indeed, defendants do not argue on appeal that they are immune from suit under § 1983.

Finally, defendants argue that plaintiffs’ § 1983 claim is barred by the statute of limitations concerning challenges to zoning ordinances. Plaintiffs urge us not to consider this argument since it was not raised below. Defendants *did* argue in their brief to the trial court that the statute of limitation barred plaintiffs’ § 1983 claims, but only “[t]o the extent

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Plaintiffs['] due process and equal protection claims are based on "a lack of notice of the amendments to the zoning ordinances. But plaintiffs' § 1983 claims are not based on any notice issue. Plaintiffs specifically alleged in their amended complaint that they are not "attacking a defect in the ordinance adoption process . . ." Defendants apparently recognized this fact as they did not argue at the motions hearing that the statute of limitations would require dismissal of these claims. Moreover, it is not clear that they ever received a ruling from the trial court on this issue. Therefore, they have not preserved this issue for our review and we will not address it. N.C.R. App. P. 10(a)(1); *Lovelace v. City of Shelby*, 153 N.C. App. 378, 384, 570 S.E.2d 136, 140 (declining to address an appellee's argument that was not raised below), *disc. rev. denied*, 356 N.C. 437, 572 S.E.2d 785 (2002).

We hold that the trial court erred in dismissing plaintiffs' claims under 42 U.S.C. § 1983 because the claims are not barred by sovereign immunity or failure to exhaust administrative remedies. Therefore, we reverse the portion of the trial court's order dismissing these claims.

V. Tax Claim

[4] Plaintiffs finally argue that the trial court erred in dismissing their claim under Article V, Section 2(2) of the North Carolina Constitution. We disagree.

Plaintiffs alleged that defendant violated Article V, Section 2(2) of the North Carolina Constitution by refusing to allow business development on property that it has classified for tax purposes as business property. The North Carolina Constitution "requires that taxation must be imposed by a uniform rule." *HED, Inc. v. Powers*, 84 N.C. App. 292, 294, 352 S.E.2d 265, 266, *disc. rev. denied*, 319 N.C. 458, 356 S.E.2d 4 (1987). That requirement is met "if the rate is uniform throughout each taxing authority's jurisdiction." *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 49, 165 S.E.2d 201, 206 (1969).

Here, plaintiffs do not actually challenge the tax classification or the uniformity of the tax rules. Indeed, they assert that the tax classification of their property as business property is entirely accurate. They have not alleged that defendants tax such property in a non-uniform manner. At best, the tax classification of plaintiffs' property might be relevant to the "good faith" element of their vested rights claim. But their allegations are insufficient to state a claim under Article V, Section 2 of the North Carolina Constitution. Therefore, we affirm the trial court's dismissal of this claim.

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VI. Conclusion

For the foregoing reasons, we conclude that the trial court erred in dismissing plaintiffs' vested rights claim and their § 1983 claims, but that it properly dismissed plaintiffs' tax claim. Therefore, we reverse those portions of the trial court's order dismissing the vested rights and § 1983 claims, affirm the portion dismissing the tax claim, and remand for further proceedings.

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

Judges HUNTER, JR., Robert N. and DILLON concur.

WALLACH v. LINVILLE OWNERS ASS'N, INC.

[234 N.C. App. 632 (2014)]

ANN B. WALLACH; DAVID WALLACH; PHILIP C. MILLER AND STEEN
CONSTRUCTION COMPANY, PLAINTIFFS

v.

LINVILLE OWNERS ASSOCIATION, INC.; WILLIAM BUFF CLAYTON;
 JAMES B. CUSHMAN; KIRSTEN M. CUSHMAN; DALIP AWASTHI; MONICA
 AWASTHI; WILLIAM J. SPARKMAN; ROXANNE E. SPARKMAN; RAJESH
 K. MANICKAM; REEMA PATEL MANICKAM; MARGARET S. NORTON,
 TRUSTEE OF MARGARET S. NORTON REVOCABLE LIVING TRUST DATED 12-4-2007; STUART
 P. GOLDBLATT; N.C. PEAKS, LLC; FELICIA R. KADIS; MATTHEW C. KING,
 JR.; JAMES A. WILLETTS; LINDA BADDOUR; CLAUDE Z. DEMBY; DONNA H.
 DEMBY; ROBERT D. HILLMANN; SUSAN L. HILLMANN; SHAWN M. BRITT;
 AARON VEDDER; MICHELLE VEDDER; TODD R. STIEFEL; DIANA G. STIEFEL;
 SCOTT J. POOLE; MATTHEW S. PALKA, JR.; FRANCES K. O'SULLIVAN;
 KEITH THOMAS SHELLY; KATHARINE KNOBIL; JOSIP CERMIN; LANTY L.
 SMITH; MARGARET G. SMITH; SCOTT ALLEN BROWN; SARA BETH BROWN;
 MASOUD MOGHADASS; MARIA D. CLARK AND CHRISTOPHER JAMES
 CLARK, TRUSTEES OF THE MARIA D. CLARK LIVING TRUST DATED SEPTEMBER 17, 2010,
 AND ANY AMENDMENTS THERETO; PABLO E. PRIU; HEIDI D. PRIU; SHEHZAD H. CHOUDRY;
 SABEEN J. KHAWAJA; JASON L. PAYTON; AMIR A. FIROZVI; ASRA S. FIROZVI;
 CHARLES STIEFEL; DANEEN STIEFEL; MARK F. KOZACKO; TAMMY Y. KOZACKO;
 MARK A. REIN; TARA A. DOW-REIN; MOHIT PASI; SONIA PASI; WILLIAM H.
 SCHEICK, JR., TRUSTEE OF THE CAROLYN R. SCHEICK REVOCABLE TRUST-1994/TR; CAROLYN
 R. SCHEICK, TRUSTEE OF THE WILLIAM H. SCHEICK REVOCABLE TRUST-1994/TR; JOHN T.
 SCHEICK, TRUSTEE OF THE GLORIA M. VERROCHI IRREVOCABLE TRUST-1994; CAROLYN R.
 SCHEICK, TRUSTEE OF THE GLORIA M. VERROCHI IRREVOCABLE TRUST-1994; JOHN T. SCHEICK,
 TRUSTEE OF THE GLORIA M. VERROCHI REVOCABLE TRUST 1994 GST EXEMPTION TRUST; CAROLYN
 R. SCHEICK, TRUSTEE OF THE GLORIA M. VERROCHI REVOCABLE TRUST 1994 GST EXEMPTION TRUST;
 STEVEN KJELLBERG; JULIE KJELLBERG; RICHARD P. MCCOOK; ANNA T. MCCOOK;
 IMAD OMAR; PAUL F. BONAVIDA; HEATEHR S. BONAVIDA; DIMITRI LYSANDER
 STOCKTON; RENEE CECILE ALLAIN-STOCKTON, DEFENDANTS

No. COA13-1116

Filed 1 July 2014

1. Parties—joinder—necessary—proper—amendment to restrictive covenants

The trial court did not err in a case involving amendments to the Declaration of Covenants, Conditions, Easements and Restrictions of a residential community by denying defendant's motion to dismiss for failure to join the necessary parties. The parties defendant alleged needed to be joined were proper but not necessary.

2. Associations—homeowners' associations—amendment to restrictive covenants—unreasonable and unenforceable

The trial court erred in a case involving an Assessment Amendment to the Declaration of Covenants, Conditions,

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Easements and Restrictions (Declaration) of a residential community by granting partial summary judgment and awarding attorneys' fees in favor of defendant. The Amendment disregarded the purpose of the Declaration's original provisions and completely eliminated the benefits to builders. Thus, the amendment was unreasonable, invalid, and unenforceable.

Appeals by plaintiffs and defendant from final judgment entered 12 March 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 February 2014.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellants.

Jordan Price Wall Gray Jones & Carlton, by Brian S. Edlin and J. Matthew Waters, for defendant-appellant.

McCULLOUGH, Judge.

Linville Owners Association, Inc. (the "Association"), appeals the trial court's denial of its motion to dismiss for failure to join necessary parties. Ann B. Wallach and David Wallach, the owners of Lot 40 and Lot 46 in Linville Subdivision, and Steen Construction Company, the owner of Lot 44 in Linville Subdivision (together "plaintiffs"), appeal the trial court's grant of partial summary judgment and award of attorneys' fees in favor of the Association. For the following reasons, we affirm the denial of the Association's motion to dismiss and reverse the grant of partial summary judgment and the award of attorneys' fees.

I. Background

This case concerns amendments to the Declaration of Covenants, Conditions, Easements and Restrictions (the "Declaration") for Linville Subdivision, a gated community in North Raleigh.

The Declaration was first recorded in the Wake County Register of Deeds on page 197 of book 10362 on 13 August 2003. It was then re-recorded in the Wake County Register of Deeds on page 2198 of book 11283 on 29 March 2005 to include an exhibit that was inadvertently omitted during the first recording. Prior to June 2005, the Declaration governed only those lots in "phase one" of Linville Subdivision. However, on 9 June 2005, a supplementary declaration was recorded in the Wake County Register of Deeds on page 2201 of book 11483 subjecting additional land, "phase two" of Linville Subdivision, to the terms of the Declaration. At all times relevant to this appeal, the

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Declaration governed all forty-four lots comprising phases one and two of Linville Subdivision.¹

Between October and December of 2011, amendments to the Declaration were recorded in the Wake County Register of Deeds. The amendments revised or added the following provisions: “Subdividing and Recombination of Lots,” “Architectural Control,” “Performance Bond and Builder Agreement,” and “Date of Commencement of Annual Assessment.” Particularly relevant to this appeal, the amendment regarding “Date of Commencement of Annual Assessment” (the “Assessment Amendment”) was recorded in the Wake County Register of Deeds on page 2295 of book 14530 on 7 November 2011.

On 6 August 2012, plaintiffs and Philip C. Miller, all of whom owned vacant lots in Linville Subdivision, commenced this action by filing a complaint seeking a declaratory judgment that the amendments to the Declaration were invalid and unenforceable. The Association and all other lot owners at the time the suit was filed were named as defendants.

In order to provide notice of the action to those acquiring title to lots in Linville Subdivision following commencement of the action, plaintiffs filed a *lis pendens* in Wake County Superior Court on 17 September 2012.

The *lis pendens*, however, did not provide notice of the action to James B. Cushman, II, and Kirsten M. Cushman, who acquired title to Lot 2 from Capital Bank in the time between the commencement of this action and the filing of the *lis pendens*. As a result, on 29 September 2012, plaintiffs filed a motion to amend the complaint to substitute the Cushmans as defendants.

Thereafter, on 4 October 2012, Jordan L. Staal and Heather Staal acquired title to Lot 26 from Masoud Moghadass with notice of the pending action via the *lis pendens*. Plaintiffs never sought to substitute the Staals as defendants.

By order filed 5 November 2012, the trial court allowed plaintiffs’ motion to amend the complaint to substitute the Cushmans as defendants. Plaintiffs then filed a second *lis pendens* naming the Cushmans as owners of Lot 2 on 7 November 2012.

On 8 November 2012, plaintiffs moved for summary judgment on the ground that the amendments were not reasonable, exceeded the

1. The lots in Linville Subdivision are numbered 1 through 46. Lots 15 and 18 were eliminated by consolidation with other lots.

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purpose of the original Declaration, and were inconsistent with the original intent of the Declaration. The Association responded on 13 November 2012 by moving to quash the *lis pendens* as unnecessary and moving to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) for failure to join the Staals, whom the Association argues are necessary parties.

By order filed 14 December 2012, the trial court denied the Association's motion to dismiss and continued the hearing on plaintiffs' motion for summary judgment. The trial court concluded,

All owners in the subdivision are not necessary parties to this action by virtue of the *Lis Pendens* filed by the Plaintiffs. Properties in the Linville Subdivision may be freely bought and sold without new owners having to be parties to the action and all owners at the time of the final judgment in this case are bound by the final judgment in this case even though they are not named parties to this action.

Following the denial of its motion to dismiss, the Association filed an answer and counterclaim on 31 December 2012. In the counterclaim, the Association sought to collect unpaid assessments owed by plaintiffs, foreclose on Claims of Lien filed and served on plaintiffs' lots to secure payment of the assessments, and collect attorneys' fees incurred in prosecuting the action.

On 4 February 2013, the Association filed a motion for summary judgment on plaintiffs' claims. Also on 4 February 2013, plaintiffs filed a response to the Association's counterclaim arguing no past due assessments were owed because the amendments to the declaration were invalid and unenforceable.

Plaintiffs' and the Association's motions for summary judgment came on for hearing in Wake County Superior Court before the Honorable Paul Ridgeway on 18 February 2013. On 4 March 2013, the trial court entered an order granting summary judgment in part and denying summary judgment in part. Pertinent to this appeal, the trial court determined the Assessment Amendment was valid and enforceable. The trial court further concluded that the Association's counterclaim was the only remaining matter to be tried.

Thereafter, the Associations' counterclaim came on for trial that same week in Wake County Superior Court, the Honorable Donald Stephens, Judge presiding. Following trial, the trial court entered

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judgment in favor of the Association, ordering the Wallachs to pay \$5,010 in unpaid assessments for Lots 40 and 46 and ordering Steen Construction Company to pay \$2,345 in unpaid assessments for Lot 44. The trial court further ordered that a Commissioner be appointed and directed to sell the lots to satisfy the indebtedness due the Association. The issue of attorneys' fees was reserved until the Association's counsel filed a supplemental affidavit.

Following receipt of the supplemental affidavit, on 25 March 2013, the trial court awarded \$5,000 in fees to the Association.

Plaintiffs gave notice of appeal on 10 April 2013. The Association gave notice of appeal on 11 April 2013.

II. Discussion

We address the Association's appeal first, followed by plaintiffs' appeal. The Association appeals the trial court's denial of its motion to dismiss. Plaintiffs appeal the trial court's partial summary judgment order finding the Assessment Amendment valid and enforceable and the trial court's order awarding the Association attorneys' fees.

Association's Appeal

[1] In the Association's appeal, the sole issue is whether the trial court erred in denying the Association's motion to dismiss for failure to join necessary parties. Upon review, we hold the trial court did not err in denying the Association's motion.

“‘A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence.’” *Warrender v. Gull Harbor Yacht Club, Inc.*, _ N.C. App. __, __, 747 S.E.2d 592, 606 (2013) (quoting *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 451–52, 183 S.E.2d 834, 837 (1971)). “‘The term “necessary parties” embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy.’” *N.C. Dep't of Transp. v. Stagecoach Village*, 174 N.C. App. 825, 827-28, 622 S.E.2d 142, 144 (2005) (quoting *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972)) (citation omitted in the original), *disc. rev. denied*, 360 N.C. 483, 630 S.E.2d 929 (2006). Pursuant to the North Carolina Rules of Civil Procedure, necessary parties “must be joined as plaintiffs or defendants[.]” N.C. Gen. Stat. § 1A-1, Rule 19(a) (2013).

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On the other hand, “[a] proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others.” *Stagecoach Village*, 174 N.C. App. at 828, 622 S.E.2d at 144. “‘Proper parties may be joined. Whether proper parties will be ordered joined rests within the sound discretion of the trial court.’” *DeRossett v. Duke Energy Carolinas, LLC*, 206 N.C. App. 647, 660, 698 S.E.2d 455, 464 (2010) (citations omitted) (emphasis in original).

On appeal, the Association claims the trial court erred in denying its motion to dismiss because the Staals, who acquired Lot 26 on 4 October 2012, were not named defendants in the action. Relying on *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 527 S.E.2d 40 (2000) and *Page v. Bald Head Ass’n.*, 170 N.C. App. 151, 611 S.E.2d 463, *disc. rev. denied*, 359 N.C. 635, 616 S.E.2d 542 (2005), the Association argues all lot owners in Linville Subdivision were necessary parties, without which the judgments are null and void. See *McCraw v. Aux*, 205 N.C. App. 717, 721, 696 S.E.2d 739, 741 (2010).

In *Karner*, our Supreme Court held nonparty property owners in a Charlotte subdivision were necessary parties to an action to enjoin a property owner from violating a residential use restrictive covenant running with each lot. *Karner*, 351 N.C. at 440, 527 S.E.2d at 44. The Court reasoned,

each property owner within Elizabeth Heights has the right to enforce the residential restriction against any other property owner seeking to violate that covenant. This right has a “distinct worth.” By operation of law, if the residential restrictive covenant is abrogated as to the lots owned by defendants, each property owner within the subdivision would lose the right to enforce that same restriction. Unless those parties are joined, they will not have been afforded their “day in court.” An adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a “valid judgment.” For this reason, we conclude the nonparty property owners of Elizabeth Heights are necessary parties to this action because the voiding of the residential-use restrictive covenant would extinguish their property rights.

Id. at 439-40, 527 S.E.2d at 44 (citations omitted).

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Thereafter, in *Page* this Court affirmed the trial court's dismissal of an assessment claim for failure to join all property owners. *Page*, 170 N.C. App. at 154, 611 S.E.2d at 465. In affirming the trial court in *Page*, this Court simply cited *Karner* for the holding that "all property owners affected by a residential use restrictive covenant were necessary parties to an action to invalidate that covenant[]" and indicated the plaintiffs acknowledged *Karner* controlled their case. *Id.* Thus, this Court found the plaintiffs' argument meritless. *Id.*

The Association now claims *Karner* and *Page* control the present case. We, however, find the present case distinguishable.

In *Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n., Inc.*, 187 N.C. App. 22, 652 S.E.2d 378 (2007) this Court distinguished a covenant for the payment of recreational amenity fees from the residential use restriction at issue in *Karner*. This Court explained that, whereas a residential use restrictive covenant included in all deeds conveying lots in a subdivision according to a common plan of development was a valuable property right enforceable by all property owners,

only the owner of the recreational amenities [in *Midsouth Golf*] ha[d] the power to levy such a recreational amenity charge. As such, only the owner of the recreational amenities ha[d] the power to enforce [the] restrictive covenant. None of the property owners within Fairfield Harbour ha[d] the right to enforce the covenant to pay amenity fees against any of the other owners. Accordingly, the extinguishment of the restrictive covenant in [*Midsouth Golf*] would not deprive the other property owners of any property right akin to the right that the nonparty property owners were deprived of in *Karner*.

Id. at 28-29, 652 S.E.2d at 383. In *Midsouth Golf*, this Court also addressed its decision in *Page*, indicating it could not rely upon *Page* because "*Page* does not reveal sufficient facts for us to determine whether the covenant at issue was similar to the one at issue in the present case." *Id.* at 29, 652 S.E.2d at 383. This Court further explained that:

Page does not discuss how the nonparty property owners were in danger of losing a property right by invalidation of the covenant because the plaintiffs effectively conceded that *Karner* applied and that the Court was bound by *Karner*. While invalidation of the covenant in the present case could have some effect on nonparty property owners in Fairfield Harbor, invalidation of the covenant would

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not deprive them of any property right, which is required under *Karner* to make them necessary parties.

Id. at 29-30, 652 S.E.2d at 383-84 (citation omitted).

Following the reasoning in *Midsouth Golf*, we hold the Staals were proper parties to the action seeking to declare the amendments to the Declaration invalid and unenforceable, but were not necessary parties. The amendments at issue in the present case did not extinguish any property rights of the Staals akin to those in *Karner*. Therefore, we hold the trial court did not err in denying the Association's motion to dismiss.

Because the Staals were not necessary parties, we need not address whether the *lis pendens* was proper in this action.

Plaintiffs' Appeal

[2] In plaintiffs' appeal, plaintiffs first argue the trial court erred in entering partial summary judgment upholding the validity and enforceability of the Assessment Amendment. Specifically, plaintiffs contend the trial court erred because the assessment amendment was not signed by seventy-five percent (75%) of the lot owners and is not reasonable in light of the contracting parties' original intent.

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

For background, the original Declaration required each lot owner to pay annual assessments to the Association. Builders, however, were afforded the following benefits:

Lots owned by the builder of the initial improvements on the Lot ("Builder") shall be assessed at a rate of twenty-five percent (25%) of the amount of the assessment due for a Lot that is owned by the Builder. The assessments on Lots owned by a Builder shall accrue each month that the Builder owns the Lot and shall not be required to be paid by the Builder until the date of closing of the sale of a Lot from a Builder to a consumer-occupant Lot Owner or the date of rental of a Lot from a builder to a consumer-occupant Lot Owner.

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The Assessment Amendment recorded in the Wake County Register of Deeds on 7 November 2011 eliminated these benefits to builders. Specifically, the Assessment Amendment provides:

There shall be no reduced assessment or delayed payment schedule for any Lot, regardless who owns the Lot or whether or not the Lot has been developed. . . .

As of the effective date of this amendment, Owners of developed/unsold, partially developed or undeveloped Lots will be required to pay all accrued assessments in full that were previously scheduled to be due per the old Article IV, Section 9 prior to this amendment (at the previous 25% rate). These assessments are to be paid by January 31, 2012.

Pursuant to its terms, the Assessment Amendment became effective 1 January 2012.

On appeal, plaintiffs first contend the trial court erred in upholding the Assessment Amendment because the Assessment amendment was not properly signed by the required number of lot owners.

The general provisions of the Declaration allow for amendment during the first twenty (20) years “by an instrument signed by not less than seventy-five percent (75%) of the Lot Owners[.]” It is undisputed that at the time of the amendments, there were 44 lots in Linville Subdivision. Therefore, approval of an amendment required the signatures of the owners of 33 lots.

The Assessment Amendment, as recorded in the Wake County Register of Deeds, appears to include signatures of approval by owners of 33 lots. Additionally, a certification signed by the president and the secretary of the Association verifying the Assessment Amendment was “duly executed by the written signatures of seventy-five percent (75%) of the membership” was recorded with the Assessment Amendment.

On appeal, plaintiffs acknowledge that if the signatures for the 33 lots were properly executed, the procedural requirements for amendment were met. Plaintiffs, however, contend that the amendment was only properly signed by owners of 30 lots. Plaintiffs allege the signatures for Lot 5, Lot 22, and Lot 37 were inadequate to approve the Assessment Amendment.

Upon review of plaintiffs’ argument, we find it is unnecessary to assess the validity of each signature.

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On a motion for summary judgment the moving party has the burden of establishing that there is no genuine issue as to any material fact. Once the moving party has met its burden, the opposing party may not rest on the mere allegations or denials of his pleading. Instead, the opposing party must set forth specific facts showing that there is a genuine issue for trial[.]

Gillis v. Whitley's Discount Auto Sales, Inc., 70 N.C. App. 270, 274, 319 S.E.2d 661, 664 (1984) (citations omitted).

In this case, the Association moved for summary judgment and the Assessment Amendment, as recorded, appears to contain the required signatures for approval. As plaintiffs admitted, it is their burden to bring forward specific facts showing the Assessment Amendment was not properly approved. Plaintiffs have not done so in this case. We hold plaintiffs' allegations as to the lack of the signees' authority to sign on behalf of the contested lots, without more, is insufficient to raise an issue for trial.

Moreover, during oral arguments before this Court, plaintiffs focused on the validity of the signatures for Lot 37 by arguing an acknowledgment signed by the trustees of the trusts owning Lot 37 and recorded in the Wake County Register of Deeds on 22 December 2011 is evidence that the amendment was not properly signed. We are not convinced. The acknowledgement provided that the trustees of the trusts owning Lot 37 "were in agreement with the [Assessment] Amendment in all respects and intended to sign off on the amendment indicating their intent to be bound by the amendment and did, in fact, sign off on the [Assessment] Amendment indicating their intent to be bound by it[.]" In executing the acknowledgment, the trustees did not concede the Assessment Amendment was not executed properly. Moreover, the acknowledgement was signed and recorded prior to 1 January 2012, the effective date of the Assessment Amendment.

Nevertheless, plaintiffs' procedural argument is not determinative in this case. Plaintiffs also argue the trial court erred in entering partial summary judgment upholding the Assessment Amendment because the amendment contravenes the original intent of the Declaration. In support of their argument, plaintiffs rely on *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006).

In *Armstrong*, our Supreme Court explained the following:

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The term amend means to improve, make right, remedy, correct an error, or repair. Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain. In the same way that the powers of a homeowners' association are limited to those powers granted to it by the original declaration, an amendment should not exceed the purpose of the original declaration.

Id. at 558, 633 S.E.2d at 87 (citations omitted). Thus, the Court held that “a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be *reasonable* in light of the contracting parties' original intent.” *Id.* at 559, 633 S.E.2d at 87 (emphasis in original).

“[A] court may ascertain reasonableness from the language of the original declaration of covenants, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community.” *Id.* at 559, 633 S.E.2d at 88. Yet, “[i]n all such cases, a court reviewing the disputed declaration amendment must consider both the legitimate needs of the homeowners' association and the legitimate expectations of lot owners.” *Id.* at 560, 633 S.E.2d at 88.

Applying the above to the facts of *Armstrong*, the Court held an amendment authorizing “broad assessments ‘for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of [the community] as may be more specifically authorized from time to time by the Board’ [was] unreasonable[,]” and thus invalid and unenforceable. *Id.* at 560-61, 633 S.E.2d at 88. In reaching its conclusion, the Court noted the nature of the community and the fact that there was nothing in the original declaration revealing an intent to confer unlimited powers of assessment on the homeowners' association. Specifically, the community was a “small residential neighborhood with public roads, no common areas, and no amenities.” *Id.* at 560, 633 S.E.2d at 88. Furthermore, the “petitioners purchased their lots without notice that they would be subjected to . . . additional affirmative monetary obligations imposed by a homeowners' association.” *Id.* at 561, 633 S.E.2d at 89.

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The Association, however, citing *Southeastern Jurisdictional Admin. Council, Inc. v. Emerson*, 363 N.C. 590, 598, 683 S.E.2d 366, 371 (2009) (holding an assessment amendment was reasonable given the community, which was in existence for nearly a century, was developed to foster a unique religious character, purchasers purchased lots with knowledge of the extensive amenities and with notice that the lots were subjected to a wide variety of detailed restrictions, and it was clear the original intent of the parties was to bind all purchasers to any rules deemed necessary to preserve the unique religious character and history of the community), argues the Assessment Amendment is reasonable in light of Linville Subdivision's unique characteristics and certain unanticipated circumstances.

Specifically, the Association distinguishes Linville Subdivision from the community in *Armstrong* on the grounds that Linville Subdivision is a private community with private roads, common areas, and amenities, all of which must be maintained and paid for by the Association. Quoting the Declaration, the Association further argues the prevailing intent behind the Declaration's original assessment provisions was to provide an assessment rate that was adequate to meet the needs of the Association. The Association contends it was never intended, nor anticipated, that builders would own unimproved lots and be exempt from the full assessment rate for extended periods of time. The developer expected that all lots would be built on by 2011. In fact, the Association points to a provision in builder agreements executed by plaintiffs that requires builders to build promptly to support its position that the Assessment Amendment is proper to address unanticipated circumstances.

While we agree with the Association that Linville Subdivision is easily distinguishable from the community in *Armstrong*, we also find the Assessment Amendment easily distinguishable from the amendment at issue in *Armstrong*. Owners of lots in Linville Subdivision have been subjected to assessments from the beginning. Unlike the amendments at issue in *Armstrong* and *Emerson*, the Assessment Amendment does not establish new assessments on the entire community, but instead eliminates benefits afforded builders; benefits that likely persuaded builders to purchase lots in the first place and were essential to the original bargain.

We find it evident from the Declaration's original language that the intent of the provision providing builders with reduced assessments and deferrals in the payment of assessments was to encourage builders to purchase lots from the developer earlier than they might otherwise have

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purchased them; even before builders were ready to build. Not only did the provisions benefit builders, they also benefited the developer who was able to sell the lots more expeditiously. In a complete reversal, the Assessment Amendment eliminated the benefits that were essential to the original bargain with builders like plaintiffs.

While the primary purpose of the assessment provisions in the Declaration may be to provide sufficient funds for the Association to maintain the community and amenities, the Association originally approved the Declaration with the benefits to builders included. Now that all lots in Linville Subdivision are sold and the Association has the required number of votes for amendment, the Association cannot now amend the Declaration to the detriment of the builders who purchased lots with the expectation that they would be afforded the benefits. Moreover, with the exception of the easement for a separate construction entrance, the costs that the Association claims it cannot now afford because three out of the forty-four lots in Linville Subdivision do not pay the full assessment rate are costs that should have been anticipated to begin with. Lastly, we are not persuaded that the language in builder agreements requiring builders to build promptly controls where the intent of the Declaration's original provisions are clear. Besides, even if the builder agreements did control, this Court will not determine what constitutes prompt as a matter of law.

Where the Assessment Amendment disregards the purpose of the Declaration's original provisions and completely eliminates the benefits to builders, we hold the amendment unreasonable, invalid, and unenforceable. Holding otherwise would permit homeowners' associations to amend similar provisions whenever they acquire the requisite number of votes for approval, regardless of the original intent. As our Supreme Court stated in *Armstrong*, "[t]his Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties." *Armstrong*, 360 N.C. at 561, 633 S.E.2d at 89.

The trial court's final judgment and order awarding the Association attorneys' fees were based on its grant of partial summary judgment upholding the Assessment Amendment. Having determined the Assessment Amendment is unreasonable, invalid, and unenforceable, we vacate the final judgment and the order on attorneys' fees. Thus, we do not address plaintiffs' final argument regarding the sufficiency of the trial court's order on attorneys' fees.

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III. Conclusion

For the reasons discussed above, we affirm the denial of the Association's motion to dismiss, reverse the grant of partial summary judgment, and vacate the final judgment and the award of attorneys' fees in favor of the Association.

Affirmed in part, reversed in part, vacated in part.

Judges McGee and GEER concur.

WEAVER INVESTMENT COMPANY AND TRAVEL CAMPS, INC.,
ON THEIR OWN BEHALF AND ON BEHALF OF FOURTH CREEK LANDING HOUSING
LIMITED PARTNERSHIP AND FOURTH CREEK LANDING ASSOCIATES, PLAINTIFFS
v.
PRESSLY DEVELOPMENT ASSOCIATES, PRESSLY DEVELOPMENT COMPANY, INC.,
DAVID L. PRESSLY, AND EDWIN A. PRESSLY, DEFENDANTS

No. COA13-624

Filed 1 July 2014

1. Unfair Trade Practices—acts occurring within partnership—no in or affecting commerce

The trial court erred in part in a fraud and unfair and deceptive trade practices case by concluding that defendants' acts were "in or affecting commerce" in North Carolina. Because the alleged misconduct of certain defendants occurred within a partnership or joint enterprise, it was not "in or affecting commerce" for the purposes of an unfair and deceptive trade practices action. Accordingly, the trial court erred in trebling damages as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court did not err by trebling damages with regard to an independent contractor. Further, because the trial court concluded that an individual defendant was individually liable for the torts committed by the independent contractor under a veil-piercing theory, that individual was subject to the same trebling of damages and attorney's fees to which the independent contractor was subject.

2. Attorney Fees—fraud—unfair trade practices—acts occurring within partnership—no in or affecting commerce

The trial court erred in part in a fraud and unfair trade practices case by awarding attorney fees based on its conclusion that

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defendants' acts were "in or affecting commerce" in North Carolina. Because the alleged misconduct of certain defendants occurred within a partnership or joint enterprise, it was not "in or affecting commerce" for the purposes of an unfair and deceptive trade practices action. Accordingly, the trial court erred in awarding attorney fees as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court did not err by awarding attorney's fees with regard to an independent contractor. Further, because the trial court concluded that an individual defendant was individually liable for the torts committed by the independent contractor under a veil-piercing theory, that individual was subject to the same attorney's fees to which the independent contractor was subject.

3. Costs—bookkeeping fees—testimony of court-appointed accountant—authority of trial court

The trial court did not err in a fraud and unfair trade practices case by awarding bookkeeping fees, relying on the testimony of a court-appointed accountant in setting those fees, and denying defendants the opportunity to rebut that accountant's testimony. The trial court had the authority to appoint an accountant to perform a forensic accounting of the entities and to assess the fees for the expert.

4. Evidence—outside of scope—damages—excluded

Where defendants sought to introduce evidence that was outside of the scope of the hearing on damages in a fraud and unfair trade practices case, the trial court did not abuse its discretion in excluding this evidence.

5. Costs—forensic accountants fees—recoverable by plaintiffs

The trial court did not err in a fraud and unfair trade practices case by ruling that the fees of the forensic accountants ordered to examine defendants' books were costs recoverable by plaintiffs.

6. Fraud—unfair trade practices—depreciation of value of property

The trial court did not err in a fraud and unfair trade practices case by holding defendants liable for the depreciation in value of certain property where there was evidence that defendants were responsible for depreciation in value of that property.

7. Appeal and Error—argument deemed abandoned—no legal support

Where defendants offered no legal argument as to why the trial court could not dissolve the partnership at issue, defendants' argument was deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

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8. Fiduciary Relationship—breach of duty—constructive fraud—unchallenged findings of fact

The trial court did not err by finding that defendants breached a fiduciary duty and engaged in constructive fraud. Defendants did not challenge the trial court's relevant findings and the findings supported the conclusion that defendants breached their fiduciary duty and engaged in constructive fraud.

9. Statute of Limitations and Repose—fraud—unfair trade practices—statute not expired

The trial court did not err in a fraud and unfair trade practices case by holding that the statute of limitations had not expired. Defendants concealed their misconduct, and this misconduct was reasonably discovered within the applicable statute of limitations periods.

Appeal by defendants from judgment entered 18 May 2011 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 21 October 2013.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by S. Leigh Rodenbough IV and Charnanda T. Reid, for plaintiff-appellees.

Eisele Ashburn Greene & Chapman, PA, by Douglas G. Eisele, for defendant-appellants.

STEELMAN, Judge.

Where alleged misconduct of certain defendants occurred within a partnership or joint enterprise, it was not "in or affecting commerce" for the purposes of an unfair and deceptive trade practices action. The trial court erred in trebling damages and awarding attorney's fees as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court had the authority to appoint an accountant to perform a forensic accounting of the entities and to assess the fees for the expert. Where defendants sought to introduce evidence that was outside of the scope of the hearing, the trial court did not abuse its discretion in excluding this evidence. Where there was evidence that defendants were responsible for depreciation in value of certain property, the trial court did not err in holding defendants liable for the depreciation. Where defendants offer no legal argument as to why the trial court could not dissolve the partnership, defendants' argument is deemed abandoned. Where defendants do not challenge the trial court's findings regarding breach of fiduciary duty and constructive fraud, the trial court did not

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err in its conclusion based upon these findings. Where defendants concealed their misconduct, and this misconduct was reasonably discovered within the applicable statute of limitations periods, the trial court did not err in holding that the statute of limitations had not expired.

I. Factual and Procedural Background

Weaver Investment Company (WIC) is one of three limited partners of Fourth Creek Landing Housing Limited Partnership (Fourth Creek Limited Partnership), with an 18.75% ownership interest. The other two limited partners are Travel Camps, Inc., (Travel) with a 37.5% interest, and Pressly Development Associates, (PDA) with an 18.75% interest. The general partner of the Partnership is Fourth Creek Landing Associates (FCLA), a general partnership, which holds a 25% interest in Fourth Creek Limited Partnership. WIC and PDA are the two general partners of FCLA, each with a 50% interest. The business relationship between WIC and PDA, as general partners of FCLA, is governed by a partnership agreement dated 16 May 1985. The business relationship between the general and limited partners of Fourth Creek Limited Partnership is governed by a limited partnership agreement, dated 16 May 1985, along with several amendments thereto.

Fourth Creek Limited Partnership owns the first phase of an apartment complex known as Fourth Creek Landing Apartments (Fourth Creek Apartments I) located in Iredell County. Pressly Development Company, Inc. (PDCI) is a corporation that manages and leases the entire Fourth Creek Landing Apartments, which includes Fourth Creek Apartments I, and an additional 48 units (Fourth Creek Apartments II) owned by a separate company, Fourth Creek Landing Associates II, LLC (FCLA II). PDCI conducts the day to day business of Fourth Creek Apartments I and Fourth Creek Apartments II. PDCI charges fees to Fourth Creek Limited Partnership for its services to Fourth Creek Apartments I. David Pressly (David) and Edwin Pressly (Edwin) are brothers who are the general partners of Free Nancy Partnership (Free Nancy), which is the sole member of FCLA II. David and Edwin each hold a 50% general partnership interest in PDA, and a 50% shareholder interest in PDCI. David is also the President of PDCI and the Manager of FCLA II. Edwin is a General Partner of PDA and the Secretary of PDCI.

On 22 December 2009, WIC and Travel filed this action against PDA and PDCI. They also brought this action on behalf of Fourth Creek Limited Partnership and FCLA. FCLA II was not a party to this action. The complaint alleged that PDA had acted *ultra vires* to the partnership agreement of Fourth Creek Limited Partnership, that PDCI or

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FCLA II had converted funds related to cable television services in Fourth Creek Apartments I, and that PDCI had engaged in inappropriate accounting practices with regard to its management services for Fourth Creek Limited Partnership. Plaintiffs sought monetary damages from defendants, termination of PDCI as property manager for Fourth Creek Apartments I, dissolution of FCLA, dissolution of Fourth Creek Limited Partnership, and monetary damages for breach of fiduciary duty against PDA.

On 19 August 2010, plaintiffs moved to join David and Edwin as defendants. This motion was granted 8 September 2010. On 10 September 2010, plaintiffs filed an amended complaint. The amended complaint alleged additional causes of action for fraud against all four defendants; constructive fraud by PDA, David and Edwin; aiding and abetting fraud and breach of contract by Edwin; unfair and deceptive trade practices as to all four defendants; establishment of a constructive trust with regard to the converted funds; punitive damages; and to pierce the corporate veil of PDCI under an alter ego theory. Plaintiffs further alleged that David, having volunteered to locate a real estate broker in order to sell the property of Fourth Creek Apartments I, delayed doing so in an attempt to maximize his profits for FCLA II and PDCI; that David executed and recorded a cross-easement between Fourth Creek Apartments I and Fourth Creek Apartments II without authority, and failed to disclose that action; and that David executed a management agreement, ostensibly on behalf of Fourth Creek Limited Partnership, without authorization.

On 11 October 2010, defendants filed an answer and motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 17 December 2010, plaintiffs voluntarily dismissed their claim for dissolution of Fourth Creek Limited Partnership pursuant to Rule 41 of the Rules of Civil Procedure. All parties waived a jury trial pursuant to Rule 38(d) of the Rules of Civil Procedure.

On 18 May 2011, following a hearing, the trial court entered judgment. The trial court found that David, on his own behalf and on behalf of PDA and PDCI, had misled plaintiffs; engaged in unauthorized conduct; overcharged Fourth Creek Limited Partnership; failed to make payments owed to Fourth Creek Limited Partnership; purposefully delayed in obtaining a broker to sell the property of Fourth Creek Apartments I in order to increase revenues for PDCI and FCLA II; converted funds from Fourth Creek Limited Partnership; used PDA and PDCI as his alter ego; and engaged in unfair and deceptive trade practices. The trial court concluded that PDCI, through David, had breached its fiduciary duty

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to Fourth Creek Limited Partnership, and had engaged in constructive fraud; that PDA, through David, had breached its fiduciary duty to FCLA and to Fourth Creek Limited Partnership, and had engaged in constructive fraud; that David, PDA and PDCI had engaged in fraud; that Edwin did not aid and abet in the breaches of fiduciary duty of PDA and PDCI; that David, PDA and PDCI had engaged in unfair and deceptive trade practices; that David was individually liable for the torts of PDCI; that David and Edwin, as owners of PDCI, were personally liable for the liability attributable to PDCI under a piercing the corporate veil theory; that David and Edwin, as general partners in PDA, were personally liable for the liability attributable to PDA; and that Edwin's conduct was such as to not merit treble damages, which were assessed against David, PDA and PDCI. The trial court further concluded that plaintiffs did not meet their burden of proving damages with regard to David's alleged delay in listing the property of Fourth Creek Apartments I for sale, his recordation of a cross-easement without authority, and his unauthorized execution of a management agreement, and that only nominal damages were appropriate for these claims. The trial court also concluded that David, Edwin, and Free Nancy reasonably relied on the business judgment rule with regard to unauthorized loans David had taken out as business necessities. The trial court ordered that an accounting of PDCI's books and records be conducted, the dissolution of FCLA, and held that, because defendants' actions did not cease three years before the filing of the suit against them, the continuing wrong doctrine barred defendants from asserting a statute of limitations defense.

The trial court awarded Fourth Creek Limited Partnership damages in the amount of \$176,000.00 for defendants' concealment of revenue, \$226,464.00 for defendants' concealment of losses resulting from the unauthorized housing of on-site employees at Fourth Creek Apartments I, \$46,872.00 for defendants' overcharging services to Fourth Creek Limited Partnership, \$1.00 nominal damages for defendants' unauthorized execution and recordation of the cross-easement, \$1.00 nominal damages for defendants' unauthorized execution of a management agreement, and \$1.00 nominal damages for defendants' purposeful delay in retaining a broker for the purpose of selling the property of Fourth Creek Apartments I. The trial court held that Edwin would not be subject to treble damages. The trial court also determined that Fourth Creek Limited Partnership was entitled to an award of attorney's fees from PDA, PDCI and David. The trial court held that the damages awarded were subject to adjustment based upon an accounting of the books and records of PDCI. The trial court appointed a receiver for Fourth Creek Limited Partnership and FCLA, terminated PDCI as property manager

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for Fourth Creek Apartments I, and ordered a forensic accounting of PDCI's books. The trial court also ordered an accounting of the replacement cost of the amenities and facilities of Fourth Creek Apartments I, which Fourth Creek Limited Partnership would be entitled to collect as damages from defendants. The trial court also ordered that PDA's share of Fourth Creek Limited Partnership be redeemed. The trial court ordered the dissolution of FCLA, but not of Fourth Creek Limited Partnership, and the termination of the cross-easement between Fourth Creek Apartments I and Fourth Creek Apartments II. Finally, the trial court held that the unauthorized satellite television equipment installed by defendants was the property of Fourth Creek Limited Partnership, as its value was less than the unpaid rent that was owed by defendants to Fourth Creek Limited Partnership. The judgment also provided that these damages could be modified based upon the future accounting.

On 20 June 2012, the trial court entered its supplemental judgment as to damages, based upon the accounting of the books and records of PDCI. It held that the net fair market value of Fourth Creek Apartments I was \$1,233,295.00; that PDA's net interest in Fourth Creek Limited Partnership was worth \$385,405.00; that the total cost for site improvements to FCLA was \$90,000.00; and that the total replacement damages for FCLA were \$160,000.00. The trial court held that Fourth Creek Limited Partnership was entitled to recover from defendants \$131,599.00 for the conversion of satellite television revenue, plus \$45,249.00 interest. The court further held that the principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of \$394,797.00.¹

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants \$13,851.00 for the assessment of management fees relating to the satellite television revenue, plus \$5,015.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of \$41,553.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants \$41,385.00 for unauthorized housing of employees, plus \$13,881.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of \$124,155.00.

1. All damages that were trebled were pursuant to Chapter 75 of the North Carolina General Statutes.

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The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants \$162,369.00 for the unauthorized income to Fourth Creek Apartments II based upon the unauthorized housing of employees, plus \$62,926.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of \$487,107.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants \$32,880.00 based upon defendants' overcharging of salaries and expenses, plus \$13,999.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of \$98,640.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants \$105,478.00 for the unauthorized collection of undisclosed bookkeeping fees beyond those contractually agreed upon by the parties, plus \$53,998.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of \$316,434.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants \$48,000.00 for failure to pay its share of the amenities of Fourth Creek Apartments I, plus \$35,531.00 interest. The principal portion of these damages was trebled with respect to PDA, PDCI, and David, for a total amount of \$144,000.00.

The trial court also held that Fourth Creek Limited Partnership was entitled to recover from defendants \$1.00 in nominal damages for the unauthorized execution and recordation of the 2001 Cross-Easement, \$1.00 in nominal damages for the execution of the 1996 Management Agreement, and \$1.00 in nominal damages for purposeful delay in contracting with a real estate broker.

In total, the trial court held that Fourth Creek Limited Partnership was entitled to \$535,562.00, plus interest of \$230,599.00, for a total of \$766,161.00. The principal amounts were trebled to \$1,606,686.00 with respect to PDA, PDCI, and David. All of the defendants were liable for the total of \$3.00 in nominal damages. The trial court credited \$385,405.00 against these damages based upon PDA's redemption of its interest in Fourth Creek Limited Partnership. The trial court further held that plaintiffs were entitled to recover from defendants \$306,380.34 in reasonable attorney's fees, \$5,500.00 for the cost of an appraisal of the Fourth Creek Apartments I amenities, \$68,854.48 for the forensic audit, and \$787.50 in expert witness fees for the testimony of the court-appointed appraiser.

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Defendants appeal.

II. Standard of Review

“The standard of review on appeal from a judgment entered after a non-jury trial is ‘whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.’” *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

Defendants have not challenged the trial court’s findings of fact.² These findings are therefore binding upon this court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Our review is therefore limited to whether the trial court’s findings support its conclusions of law.

III. Unfair and Deceptive Trade Practices

[1] In their first argument, defendants contend that the trial court erred in concluding that defendants’ acts were “in or affecting commerce” in North Carolina. We agree in part.

Pursuant to N.C. Gen. Stat. § 75-1.1, “[i]n order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.” *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

Our Supreme Court has held that N.C. Gen. Stat. § 75-1.1 does not apply within the confines of a partnership. *See White v. Thompson*, 364 N.C. 47, 691 S.E.2d 676 (2010). In *White*, the defendant, a partner in the Ace Fabrication and Welding entity, diverted work from the partnership prior to his departure from the business, and improperly maintained accounts. Plaintiffs brought action against defendant, alleging breach of fiduciary duty. The trial court ruled in favor of plaintiffs, and granted plaintiffs treble damages. *Id.* at 47-51, 691 S.E.2d at 676-78. On appeal, a majority of this Court reversed the treble damages, holding that defendant’s usurpation of partnership opportunities was not “in or affecting

2. Defendants mischaracterize the court’s conclusions of law that defendants breached their fiduciary duty and engaged in constructive fraud as findings of fact; they are not findings of fact, but conclusions of law.

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commerce” under our Unfair and Deceptive Trade Practices statute. The majority otherwise affirmed the trial court’s decision. *Id.* at 51, 691 S.E.2d at 678-79. The Supreme Court held that “[o]ur prior decisions have determined that the General Assembly did not intend for the Act’s protections to extend to a business’s internal operations.” *Id.* at 53, 691 S.E.2d at 680. It affirmed the decision of the Court of Appeals, concluding that defendant’s conduct within the partnership was not “in or affecting commerce.”

The facts of the instant case show that PDA was a member of Fourth Creek Limited Partnership; that David and Edwin were the general partners of PDA; that defendants, through PDCI, were engaged by Fourth Creek Limited Partnership to operate Fourth Creek Apartments I; and that defendants engaged in various acts inconsistent with their obligations to Fourth Creek Limited Partnership.

We hold that, while the evidence in the record supports the trial court’s findings that defendants committed fraud, delayed in the sale of real property, and had a duty to provide an accounting to plaintiffs, it also clearly shows the status of David, Edwin, and PDA as partners within the Fourth Creek Limited Partnership joint enterprise. Pursuant to the Supreme Court’s decision in *White v. Thompson*, defendants’ misconduct within the confines of the partnership was not “in or affecting commerce,” and therefore does not invoke N.C. Gen. Stat. § 75-1.1 or its trebling provisions. We hold that, while the trial court did not err in imposing damages against David, Edwin, and PDA for their misconduct, it erred in trebling the damages against David and PDA with regard to satellite revenue, employee housing, bookkeeping, salaries and expenses, and failure to maintain amenities, pursuant to North Carolina’s Unfair and Deceptive Trade Practices statute, specifically N.C. Gen. Stat. § 75-16. Additionally, because the award of attorney’s fees was made pursuant to N.C. Gen. Stat. § 75-16.1, based upon defendants’ alleged violations of the Unfair and Deceptive Trade Practices statute, we hold that the trial court erred in awarding attorney’s fees to plaintiffs, with regard to David, Edwin and PDA.

PDCI, however, was not a member of the Fourth Creek Limited Partnership. The trial court found that PDCI “has served as the property manager and leasing manager . . . for the entire Fourth Creek Landing Apartments . . . [and] controls the day to day affairs of the Fourth Creek Landing Apartments[.]” Although the conduct of David, Edwin, and PDA was within the partnership context, and thus was not “in or affecting commerce,” PDCI was a separate entity hired by Fourth Creek Limited Partnership.

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Our Supreme Court has held that an employee's fraudulent self-dealing misconduct "[did] not preclude applicability of N.C.G.S. § 75-1.1 to [his] case." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 34, 519 S.E.2d 308, 312 (1999). In *Sara Lee*, plaintiff Sara Lee hired defendant to "develop[] and maintain[] relationships with vendors to provide [Sara Lee Knit Products] with the best possible pricing, availability, and support of hardware and services." *Id.* at 29, 519 S.E.2d at 309. Defendant was "authorized and entrusted to order and purchase computer parts at the lowest possible prices[,] and was "responsible for the maintenance and repair of personal computers." *Id.* During his employment with Sara Lee, defendant "developed four separate businesses . . . through which he engaged in self-dealing by supplying Sara Lee with computer parts and services at allegedly excessive cost while concealing his interest in these businesses. Sara Lee paid a total of \$495,431.54 to defendant's businesses for parts and services." *Id.*

When Sara Lee brought action against defendant for this fraud, the trial court ruled in favor of Sara Lee, holding that "[t]he transactions between Sara Lee and the Carter Enterprises were not open, fair and honest. In fact, the clear, cogent, and convincing evidence is, to the contrary, that [defendant] used his position of trust at Sara Lee to make profits on transactions involving the Carter Enterprises without disclosing his financial interest in the Carter Enterprises to his superiors at Sara Lee." *Id.* at 30, 519 S.E.2d at 310. This Court agreed, holding that "[d]efendant breached his fiduciary duty by selling computer parts to Sara Lee without disclosing his interest in the companies supplying these parts." *Id.* (quoting *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 471, 500 S.E.2d 732, 737 (1998)). However, this Court then held that the defendant did not violate § 75-1.1, because he was employed by Sara Lee at the time of the fraud.

Our Supreme Court reversed, concluding that defendant's conduct was "in or affecting commerce," and that,

having already characterized defendant's conduct as buyer-seller transactions that fall squarely within the Act's intended reach, we conclude that defendant's relationship to plaintiff as an employee, under these facts, does not preclude applicability of N.C.G.S. § 75-1.1 to this case. Even though defendant was an employee, he nevertheless engaged in self-dealing conduct and "business activities." N.C.G.S. § 75-1.1(b). On these facts, defendant's mere employee status at the time he committed these acts does not safeguard him from liability under the Act.

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Id. at 34, 519 S.E.2d at 312.

If an employee can be held liable under § 75-1.1, it seems clear that an independent contractor, such as PDCI, may also be held liable. Accordingly, we hold that the trial court did not err in trebling damages and awarding attorney's fees with regard to PDCI. Further, because the trial court concluded that David was individually liable for the torts committed by PDCI under a veil-piercing theory, David is subject to the same trebling of damages and attorney's fees to which PDCI is subject.

We vacate the portions of the trial court's order trebling damages and awarding attorney's fees against David, Edwin and PDA, as members of Fourth Creek Limited Partnership, pursuant to the Unfair and Deceptive Trade Practices statute, and remand for an order reducing damages accordingly. We affirm the judgment of the trial court trebling damages and awarding attorney's fees with regard to PDCI, and David individually based upon a piercing the corporate veil theory through PDCI.

IV. Awards of Fees, Costs and Damages

In their second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth arguments, defendants contend that the trial court erred in awarding attorney's fees and bookkeeping fees, in basing its damages upon the testimony of an expert witness and denying defendants the opportunity to rebut that testimony, in awarding as costs the fees of expert witnesses, in awarding damages for the depreciation in value of Fourth Creek Apartments I, in basing damages upon the fair market value of Fourth Creek Apartments I, and in removing PDCI from the Partnership.³

A. Attorney's Fees

[2] Defendants first contend that the trial court erred in awarding attorney's fees. We agree in part.

The trial court awarded attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1. This statute provides:

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such

3. Defendants contend that the trial court erred in removing PDCI as a member of the partnership. However, the trial court did not remove PDCI; it removed FCLA, and its half-owner PDA, from the partnership.

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attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2013). As we held above, the trial court erred in concluding that certain defendants violated N.C. Gen. Stat. § 75-1.1. Accordingly, the trial court erred in awarding attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 against David, Edwin, and PDA, as members of Fourth Creek Limited Partnership; the trial court did not err in awarding attorney's fees against PDCI, or against David who was individually liable for the actions of PDCI under a veil-piercing theory. As described in Section III of this opinion, we vacate the award of attorney's fees with respect to David, Edwin and PDA, and find no error with respect to PDCI, and David through PDCI. As discussed in Section III of this opinion, above, we remand with instructions for the trial court to award fees only against PDCI, and David through PDCI.

B. Bookkeeping Fees

[3] Defendants next contend that the trial court erred by awarding bookkeeping fees, by relying on the testimony of Eric Lioy in setting those fees, and by denying defendants the opportunity to rebut Lioy's testimony. We disagree.

Eric Lioy is a Grant Thornton accountant who was charged by the court to provide an accounting of PDCI's expenses for "things such as satellite television revenue, employee housing, affects [sic] of the management fee and a couple other matters[.]" The trial court's judgment does not cite to his testimony, because Lioy did not testify at trial, but testified instead at a separate hearing, on 10 October 2011. Regarding Lioy's testimony, the trial court held that:

Now, this is really just designed -- I'm not -- I'm not going to treat it as an evidentiary hearing, but I'm going to treat it as a way of this witness helping me and Mr. Eisele go through the book[s] and -- or the documents and sort of just take me through it step by step as to what it -- how it's comprised and how -- what findings were made and

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just sort of take me through it as kind of a guideline or road map.

At this hearing, Lioy testified under oath that he and his team performed the services requested by the court, which also included forensic accounting, searches of computer documents, and double-checking of accounting calculations between “January 1, 2002 through March 31, 2011.” Lioy went on to testify to the contents of his report, which had been previously submitted to the trial court. At no point did defendants object to Lioy’s testimony. Defendants did object, however, to “this \$159,000 item[,]” referring to a \$159,176.00 item in the report, which was bookkeeping fees paid by Fourth Creek Apartments I to PDCI in 1999, plus interest. Defendants contended at the hearing that this item

was not raised in the pleadings, it was never suggested during the trial, there was no mention of it made in oral argument at any time, it was not the subject of any amendment to the pleadings made at the conclusion of the trial. I didn’t know anything about it until the Grant Thornton report came down and I’m sure Mr. Rodenbough didn’t know about it until the Grant Thornton report came down.

The trial court noted defendants’ objection, but held that “that’s something we’re going to need to take up at a subsequent hearing.”

The hearing was recessed, and subsequently reconvened on 2 December, 2011. At this hearing, defendants once again objected to the bookkeeping fees, asserting that “[t]he word bookkeeping fees never came up.” The trial court responded, however, that “Mr. Eisele, my recollection of things and my concept of things are different from yours.” The trial court overruled defendants’ objection, and considered the evidence.

The trial court’s order did not refer to Lioy’s testimony. Instead, as defendants concede,

there is nothing in the record except the Grant Thornton report (presented at a hearing deemed not to be “evidentiary”) pertaining to bookkeeping fees, save and except (1) par. 8.7(c) of the Limited Partnership Agreement (Ps’ Ex 3) allowing as Expenses “(c) legal, audit, accounting, brokerage and other fees”, and (2) Defendants’ Exhibit H-2, which reveals bookkeeping fees in addition to PDC’s 6% commission dating back to 1999.

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Defendants acknowledge the existence of evidence to support the trial court's finding that PDCI charged bookkeeping fees; the fact that the trial court may or may not have additionally relied upon Mr. Lioy's testimony is irrelevant. This evidence supports a finding that PDCI charged fees for bookkeeping, which as stated above supports an order awarding those fees as damages to plaintiffs.

The trial court found that PDCI had charged plaintiffs for bookkeeping, while PDCI used its own formulae on Fourth Creek Limited Partnership's books to conceal the treatment of particular expenses. As a result of the commingling of assets between defendants and Fourth Creek Limited Partnership, the trial court ordered that forensic investigators "inquire into . . . failures by [PDCI] to properly calculate, allocate and/or charge to [Fourth Creek Limited Partnership] any management fees, bookkeeping fees, employee reimbursements or other expense reimbursements," which the Partnership would be entitled to receive as damages. PDCI charged plaintiffs for bookkeeping services, and then fraudulently concealed expenses from plaintiffs on those books. We therefore hold that, where PDCI used its authority as bookkeeper to fraudulently conceal expenses, the trial court did not err in awarding damages to plaintiffs based upon the bookkeeping fees charged by PDCI.

This argument is without merit.

C. Defendants' Evidence on Bookkeeping Fees

[4] At the hearings before the trial court to address the amount of damages, attorney's fees and costs to be awarded to plaintiffs, defendants sought to introduce evidence that defendants were entitled to charge fees for the bookkeeping defendants performed. Defendants intended to use this evidence to rebut plaintiffs' claims that defendants' fees were fraudulent, and sought to make an offer of proof before the trial court. The trial court excluded this evidence. Defendants contend that this exclusion was error. We disagree.

We note first that the trial court's decisions to admit or exclude evidence are reviewed for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

In its 18 May 2011 order, the trial court found that defendants used accounting procedures to improperly allocate expenses to Fourth Creek Landing Partnership. Preliminary damages were awarded to plaintiffs, subject to being increased or decreased based upon a forensic accounting ordered by the court. At the hearings on the amount of damages,

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defendants sought to introduce evidence as to “the propriety of charging bookkeeping expenses as a project cost to the project and not to be included in the six percent management fee . . .”

The trial court held that it had already ruled on the liability issue in its 18 May 2011 order, and that the current hearing was limited to damages. Since the evidence offered by defendants went to liability rather than damages, the trial court excluded the evidence. We discern no abuse of discretion on the part of the trial court in the exclusion of this evidence.

This argument is without merit.

D. Court-Ordered Accounting

[5] In a supplemental order and judgment on damages dated 12 June 2012, the trial court ruled that the fees of the forensic accountants ordered to examine the books of Fourth Creek Limited Partnership and PDCI were costs recoverable by plaintiffs. Defendants contend that the trial court erred in awarding these fees as costs against defendants. We disagree.

Pursuant to the North Carolina Rules of Evidence, an expert appointed by the court is “entitled to reasonable compensation in whatever sum the court may allow. . . . In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.” N.C. R. Evid. 706.

Defendants contend that the forensic accountants were not court-appointed experts, but plaintiffs’ experts, and thus that these fees should not have been taxed as costs. Defendants argue that the accountants never provided defendants with a copy of their findings. The testimony cited by defendants shows that the accountant, Lioy, did not provide defendants with a copy of his report. However, this same testimony indicates that defendants never sought this report, and that Lioy had discussed the contents of the report at length with defendants.

Defendants further contend that another court-appointed accountant, Nancy Tritt, engaged in extensive *ex parte* communications with plaintiffs. However, defendants merely assert that there were contacts between plaintiffs and the expert; defendants present no evidence that such contacts were improper. Defendants further concede that there are times when *ex parte* contact with a court-appointed expert is not improper. See *Point Intrepid, LLC v. Farley*, ___ N.C. App. ___, ___,

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714 S.E.2d 797, 802-03 (2011). In the instant case, the record demonstrates that the trial court ordered that forensic accountants perform “a complete accounting of the books and records maintained by [PDCI] for [Fourth Creek Limited Partnership] and [Fourth Creek Apartments I][.]” There is no evidence that these experts were deposed by either party. There is no evidence that the accountants were not court-appointed experts, nor that any improper contact occurred. There is evidence to show that these were court-appointed experts, and we therefore hold that the trial court did not err in awarding their fees as costs.

This argument is without merit.

F. Damages

[6] Defendants next contend that the trial court erred in awarding damages for the depreciated value of the amenities on Fourth Creek Apartments I as a result of PDCI’s management, and awarding damages based upon the value of the property itself. Defendants contend that the only parties which caused the depreciation were FCLA II and Free Nancy, neither of which was a party to this lawsuit, and that this award was simply a means of bypassing issues of joinder. However, the trial court held that it was defendants, acting through FCLA II and Free Nancy, that caused the actions which led to the depreciation of the amenities. Accordingly, the trial court did not err in holding defendants liable for the depreciation in value caused by their actions.

This argument is without merit.

G. Dissolution

[7] Defendants also contend that the trial court erred in removing PDCI from Fourth Creek Limited Partnership. Defendants contend that, absent total dissolution of Fourth Creek Limited Partnership, there is no legal basis for the removal of PDCI. We first note that PDCI was not removed from the partnership; FCLA, and its half-owner PDA, were removed from the partnership.

Even assuming that defendants were contending that the trial court erred in removing PDA, however, defendants do not cite this Court to any authority indicating that the trial court lacked the authority to remove FCLA and PDA. Accordingly, defendants’ argument on this point is deemed abandoned. *See* N.C. R. App. P. 28(b)(6).

This argument is without merit.

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V. Breach of Duty and Constructive Fraud

[8] In their eleventh argument, defendants contend that the trial court erred in finding that PDCI and PDA breached fiduciary duty to Fourth Creek Limited Partnership and FCLA and engaged in constructive fraud. We disagree.

The trial court found as fact that defendants had converted funds, had engaged in unauthorized and *ultra vires* conduct, had profited without informing Fourth Creek Limited Partnership, and had delayed in taking actions beneficial to Fourth Creek Limited Partnership in order to maximize their own profits. Defendants do not challenge these findings; rather, they assert that their conduct was entirely legal. The trial court's findings support the conclusion that defendants breached their fiduciary duty and engaged in constructive fraud.

This argument is without merit.

VI. Statute of Limitations

[9] In their twelfth argument, defendants contend that the trial court erred in concluding that plaintiffs' claims were not barred by the statute of limitations. We disagree.

The trial court examined defendants' affirmative defense of the statute of limitations extensively. It concluded that (1) because defendants engaged in continuing conduct that had not ceased prior to three years before the filing of the instant lawsuit, the continuing wrong doctrine prevented the statute of limitations from running; (2) because defendants actively concealed their wrong from plaintiffs, the doctrine of equitable estoppel prevented them from relying upon their concealment to cause the statute of limitations to expire; (3) plaintiffs' claims for dissolution are not subject to the statute of limitations, since the statute would only begin to run from the time of discovery of defendants' wrongdoing; (4) plaintiffs' claim for unfair and deceptive trade practices is governed by a four-year statute of limitations, N.C. Gen. Stat. § 75-16.2, which begins to run when the fraud is discovered or should have been discovered, rather than when the act is committed, *see Nash v. Motorola Communications and Electronics, Inc.*, 96 N.C. App. 329, 331-32, 385 S.E.2d 537, 538 (1989); and (5) plaintiffs' remaining claims were governed by a ten-year statute of limitations, N.C. Gen. Stat. § 1-56, which had not expired at the time the lawsuit was filed. The trial court based these conclusions on its findings that this action was filed in 2009; that operation of the satellite television system was disclosed to Fourth Creek Limited Partnership in a meeting in 2009; that plaintiffs could

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not have reasonably discovered defendants' on-site housing of employees until this information was revealed in 2009; that defendants were assessing disproportionate costs to Fourth Creek Limited Partnership as recently as October 2009; and that these costs were not revealed until late 2009. Defendants do not challenge these findings; instead, defendants contend that plaintiffs' negligence, not defendants' concealment, was the cause of plaintiffs' late discovery of defendants' conduct, and that the statute of limitations should bar plaintiffs' claims. As defendants do not challenge the trial court's findings, they are binding upon this Court on appeal. *Koufman* 330 N.C. at 97, 408 S.E.2d at 731. These findings support the trial court's conclusion that the statute of limitations did not bar plaintiffs' claims.

This argument is without merit.

VII. Conclusion

The portions of the trial court's judgment awarding trebled damages and attorney's fees pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.* against David, Edwin, and PDA, are vacated. The trial court, upon remand, shall award damages for these claims, without trebling. The portions trebling damages and awarding attorney's fees against PDCI, and David through PDCI, are affirmed. All other aspects of the trial court's order are affirmed.

VACATED AND REMANDED IN PART, AFFIRMED IN PART.

Chief Judge MARTIN and Judge DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 JULY 2014)

ARMSTRONG v. HUTCHENS No. 13-1225	Guilford (00CVS3986)	Affirmed
BOTTOMS v. STRUM No. 14-75	Nash (11CVD1697)	Affirmed
BRADLEY v. DOE No. 13-1392	Nash (12CVS1638)	Affirmed
BRUNS v. NC FARM BUREAU MUT. INS. CO., INC. No. 14-52	Craven (12CVS1495)	Vacated in Part, Dismissed in Part
COTTEN v. WORRELLS No. 14-155	Johnston (13CVD2741)	Affirmed
DYKES v. LONG No. 14-148	Lee (12CVS867)	Affirmed
ELJ, INC. v. JEFFERYS No. 13-1420	Onslow (13CVS2383)	Affirmed
GRIFFITH v. NC PRISONER LEGAL SERVS., INC. No. 13-1194	Bertie (13CVS235)	Affirmed
HARRISON v. GEMMA POWER SYS., LLC No. 13-1358	N.C. Industrial Commission (167921)	Affirmed in part, Vacated and Remanded in part
IN RE J.M. No. 14-24	Iredell (10JA213) (11JA208)	Affirmed
IN RE K.G.A.W. No. 14-137	Cleveland (08JT183-184)	Affirmed
IN RE K.M.S. No. 14-170	Haywood (12JT95-96)	Affirmed
IN RE K.T. No. 14-95	Onslow (13JA153-154)	Affirmed

IN RE S.C.R. No. 14-80	Rockingham (13JA82-84)	Affirmed
KYPRIANIDES v. MARTIN No. 14-78	Hertford (11CVS250)	Reversed, in part; dismissed, in part.
LATAK v. LATAK No. 14-131	Buncombe (10CVD917)	Affirmed
LIPE v. STARR DAVIS CO., INC. No. 14-90	N.C. Industrial Commission (429068)	Affirmed
McKINNEY v. GREATER GETHSEMANE AME ZION CHURCH OF CHARLOTTE, N.C., INC. No. 13-1448	Mecklenburg (13CVS2506)	Affirmed
OLAVARRIA v. WAKE CNTY. HUMAN SERVS. No. 13-1215	Wake (13CVS491)	Affirmed
POWE v. CENTERPOINT HUMAN SERVS. No. 13-1410	N.C. Industrial Commission (150598)	Affirmed
STATE v. BOGGS No. 14-163	Mecklenburg (12CRS206454-55)	Dismissed
STATE v. BUCK No. 13-1044	Burke (11CRS2390)	No Error
STATE v. CASE No. 13-1269	Transylvania (11CRS50979) (12CRS50115) (12CRS52184)	No Error
STATE v. DAVIS No. 13-1201	Mecklenburg (12CRS211387) (12CRS27326)	Reversed and Remanded
STATE v. EDWARDS No. 14-49	Wake (11CRS211595) (13CRS300)	No Error

STATE v. ELLER No. 13-1433	Iredell (08CRS59811) (08CRS59812) (08CRS59813) (08CRS59814) (08CRS59815) (08CRS59893) (08CRS59894) (08CRS59895) (08CRS59896) (08CRS7500) (09CRS7498) (09CRS7499) (12CRS51941) (12CRS51942) (12CRS51943)	No prejudicial error in part; vacated and remanded in part
STATE v. FRIERSON No. 13-1415	Buncombe (11CRS60559)	Dismissed
STATE v. GALAVIZ-TORRES No. 13-1318	Mecklenburg (12CRS213245) (12CRS213246)	New Trial
STATE v. GILL No. 13-1256	Buncombe (12CRS50549-550)	Affirmed
STATE v. HALL No. 14-40	Johnston (12CRS2813)	No Error
STATE v. HIGGINS No. 13-1315	Buncombe (11CRS63843)	No Error
STATE v. HINTON No. 13-1335	Nash (11CRS50675)	No Error
STATE v. MARTINEZ No. 14-83	Davidson (13CRS728)	No Error
STATE v. McKENZIE No. 13-1366	Cumberland (09CRS58449)	No Error
STATE v. McNEILL No. 14-64	Cumberland (01CRS53303)	Affirmed
STATE v. MERRELL No. 14-66	Watauga (13CRS50053)	No error, in part; dismissed, in part.

STATE v. NEAL No. 13-1418	Stokes (12CRS51512-24) (12CRS51668) (13CRS185)	No Error
STATE v. OSBORNE No. 13-1372	Ashe (10CRS51166)	Vacated
STATE v. POWELL No. 13-1109	Burke (10CRS52989)	No Error
STATE v. ROSALES No. 13-1373	Burke (11CRS2419) (11CRS52565)	No Error
STATE v. SCALES No. 13-1462	Guilford (12CRS67263)	No Error
STATE v. SHOATS No. 14-9	Cleveland (11CRS51589-90)	No Error
STATE v. SPELLMAN No. 13-1192	Edgecombe (12CRS51319-21) (12IFS450)	No Error
STATE v. VAZQUEZ No. 13-1257	Mecklenburg (09CRS246322) (09CRS250051)	No Error
STATE v. WILLIAMS No. 13-1327	New Hanover (12CRS59892) (13CRS40)	Vacated
STATE v. WOOD No. 14-154	Durham (12CRS59532)	Affirmed
TIMBER INTEGRATED INVS., LLC v. WELCH No. 13-1034	Haywood (06CVS905)	Reversed and Remanded
WHEELESS v. MARIA PARHAM MED. CTR., INC. No. 13-1063	Vance (11CVS859)	Reversed

BREWSTER v. VERBAL

[234 N.C. App. 668 (2014)]

KARLETTE D. BREWSTER, PLAINTIFF

v.

CLAUDE A. VERBAL, II, MARGIE H. VERBAL, DEFENDANTS

No. COA13-1344

Filed 1 July 2014

1. Agency—apparent authority—retention of legal counsel

Claude Verbal's retention of legal counsel on behalf of defendant Margie Verbal was within Claude's apparent agency authority, on the totality of the circumstances as presented to the attorney, particularly noting that Claude was a co-owner of the property rented to plaintiff, Claude was Margie's son, and Margie did not live in North Carolina.

2. Jurisdiction—personal—general appearance by attorney—waiver of right to challenge personal jurisdiction

An attorney's representation constituted a general appearance submitting defendant Margie Verbal to the jurisdiction of the court and she, therefore, waived her right to challenge the trial court's exercise of personal jurisdiction.

Appeal by defendant Margie H. Verbal from order entered 25 September 2013 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 22 April 2014.

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellee.

Attorney George Ligon, Jr., for defendant-appellant Margie H. Verbal.

No brief was filed for defendant Claude A. Verbal, II.

BRYANT, Judge.

Where a joint property owner acted within the scope of his apparent authority in retaining trial counsel to defend the property owners against a negligence suit, we hold that defendant property owner was bound by the acts of the joint owner and subsequently bound by the acts of trial counsel representing the owners. Therefore, we affirm the trial court order denying defendant's motion to dismiss plaintiff's complaint

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for violations of Civil Procedure Rules 12(b)(2), (4), (5), and (6). We also affirm the denial of defendant's motion to set aside a default judgment.

On 16 November 2011, plaintiff Karlette Dandy Brewster filed a complaint against defendants Claude A. Verbal, II, and Margie H. Verbal in Durham County Superior Court. Margie and Claude are mother and son. Two civil summons were also filed in the Durham County Superior Court Clerk's Office stating that each summons and a copy of the complaint had been received by Pamela Verbal (Claude Verbal's wife and Margie Verbal's daughter-in-law) at the address listed for Claude A. Verbal, II, and Margie H. Verbal.

In her complaint, plaintiff alleged that defendants exercised dominion and control over a property located at 4005 Destrier Drive in Durham, which defendants rented to Brewster. On 17 April 2011, plaintiff was attempting to enter the rental property when she fell in an unlit section of a stairwell. Plaintiff asserted a claim of negligence.

On 23 January 2012, "Defendants Claude A. Verbal and Margie H. Verbal . . . by and through [counsel Jonathan Wilson II]" filed a motion to dismiss and an answer to plaintiff's complaint. Subsequently, plaintiff filed a motion to compel depositions and sanctions against defendants for failure to attend two depositions. Following a settlement between the parties as to plaintiff's motion, the trial court entered a consent order wherein Claude agreed to make himself available for depositions. In its order, the trial court noted that defendants were represented by Wilson. On 19 December 2012, plaintiff filed a motion for default, contempt and sanctions alleging that defendants failed to appear for scheduled mediation and failed to respond to discovery requests. On 16 January 2013, the trial court entered a default judgment as to defendants' liability. On 8 August 2013, defense counsel Jonathan Wilson, II, filed a motion to withdraw as counsel stating that he was "retained by the Defendants to represent them in this pending civil matter" but that "the Defendant has refused to abide or respond to counsel's means of communication." Defense counsel's motion to withdraw was granted. On 17 September 2013, Margie filed a motion to dismiss and motion to set aside the default judgment.

In her motion, Margie contended that the action against her should be dismissed pursuant to Civil Procedure Rules 12(b)(2) (lack of jurisdiction of the person), (4) (insufficiency of process), (5) (insufficiency of service of process), and (6) (failure to state claim upon which relief could be granted). Margie contended that she did not reside in North Carolina and had not resided in North Carolina in over thirty years, had

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never been served with process, did not authorize or consent to representation by Jonathan Wilson or the Law Offices of John C. Fitzpatrick, and did not receive any notice to appear at a mediation conference or deposition. Further, Margie alleged that she had a meritorious defense to the negligence claim including contributory negligence and that she never leased the premises to plaintiff. In her affidavit, Margie averred that she had no knowledge of the lawsuit naming her as a defendant “until August 2013 when [she] received a letter . . . from the plaintiff’s attorney.”

Jonathan Wilson also filed an affidavit. Wilson averred that he was retained by Claude Verbal who represented to Wilson that Margie Verbal was physically ill and resided in the Midwestern part of the country, and that Margie was aware of Wilson’s representation of her in this civil matter.

On 25 September 2013, the trial court entered an order in which it concluded that by ceding all involvement with the property to her son since at least 1997, Margie Verbal created an agency relationship with her son. In accordance with this relationship, Claude had authority to procure legal counsel to act for the benefit of both owners should the need arise; thus, Claude’s retention of Wilson was within the scope of that authority. The court concluded that any defenses to personal jurisdiction based on insufficient process or service of process had been waived. Margie’s motion to dismiss the action or set aside the default judgment was denied. Margie Verbal appeals.

On appeal, Margie Verbal raises the following issues: whether the trial court erred in denying her (I) motion to dismiss; and (II) motion to set aside default judgment.

I

[1] Margie first argues that the trial court erred in denying her motion to dismiss plaintiff’s claim as to her on the grounds that the trial court lacked personal jurisdiction. Specifically, Margie argues that North Carolina’s long-arm statute does not permit the exercise of personal jurisdiction over her and that the exercise of personal jurisdiction does not comport with due process. Margie further argues that her son Claude was not authorized to retain counsel on her behalf; that attorney Jonathan Wilson was not authorized to act on her behalf; and that she did not waive her Rule 12(b) defenses. We disagree.

The standard of review of an order determining personal jurisdiction is whether the findings of fact by the

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trial court are supported by competent evidence in the record. 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. We review de novo the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant.

Bell v. Mozley, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (citation and quotations omitted).

As an appearance by an attorney on behalf of Margie addressing the merits of plaintiff's claim prior to contesting personal jurisdiction will waive a defense to the exercise of personal jurisdiction, we first consider whether her son Claude acted as Margie's agent in retaining counsel to address plaintiff's claims and, if necessary, whether Wilson's involvement in the initial stages of the action constituted a general appearance made prior to contesting the exercise of personal jurisdiction.

"An agent is one who acts for or in the place of another by authority from him." *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E.2d 210, 213 (1954) (citation omitted). "The power of an agent, . . . to bind his principal, may include, not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted [sic] to him . . ." *Research Corp. v. Hardware, Inc.*, 263 N.C. 718, 721, 140 S.E.2d 416, 418 (1965) (citation omitted).

A principal-agent relationship arises upon two essential elements: (1) [a]uthority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent. 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....

Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 599, 394 S.E.2d 643, 650 (1990) (citation and quotations omitted). Agency may also be inferred from the nature of continuous acts known to the principal such that the principal would not have allowed the agent to so act unless authorized. See *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 359, 128 S.E.2d 835, 839-40 (1963); see also *Partin v. Power & Light Co.*, 40 N.C. App. 630, 637, 253 S.E.2d 605, 611 (1979) ("Mere relationship or family ties, unaccompanied by any other facts or circumstances, will not justify an inference of agency, but such relationship is entitled to great weight, when

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considered with other circumstances, as tending to establish agency.” (citations omitted)).

In its 25 September 2013 order denying Margie’s motion to dismiss, the trial court found that the property plaintiff rented – located at 4005 Destrier Drive in Durham – was owned by defendants Claude Verbal and his mother Margie Verbal; Margie did not live in North Carolina but rather has resided in Michigan for the past thirty years; and per Margie’s affidavit, she “[has] not had any involvement with the real property located at 405 Destrier Drive in Durham, North Carolina since 1997.” The trial court reasoned that by conceding to her son Claude all involvement with the property since at least 1997, Margie Verbal “expressly or implicitly created an agency relationship with her son, whereby her son had authority to act on her behalf to, among other things, lease the property to tenants such as the Plaintiff and to receive tax notices and to pay taxes on the property.” We agree. *See Partin*, 40 N.C. App. at 637, 253 S.E.2d at 611 (“relationship or family ties . . . [are] entitled to great weight, when considered with other circumstances, as tending to establish agency.” (citation omitted)).

The trial court further concluded that retention of legal counsel to defend the property owners from claims such as plaintiff’s was reasonably foreseeable and thus, within the scope of Claude’s authority to act on behalf of Margie.

“[A]n agent may usually bind his principal as to all acts within the scope of his agency including not only the authority actually conferred, but such as is usually confided to an agent employed to transact the business which is given him to do, and it is held that, as to third persons, this real and apparent authority is one and the same” *Research Corp.*, 263 N.C. at 721, 140 S.E.2d at 418 (citation omitted). “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.” *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 242, 388 S.E.2d 178, 182 (1990) (citation omitted). “The principal may be estopped to deny that a person is his agent or that his agent has acted within the scope of his authority.” *Research Corp.*, 263 N.C. at 721, 140 S.E.2d at 419 (citations omitted). “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 omitted).

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The trial court found that per Jonathan Wilson's affidavit,

he had been retained by Claude A. Verbal, II and that based upon conversations with Claude A. Verbal, II he was led to believe that his mother, Margie H. Verbal was physically ill and resided in the Midwest. Mr. Wilson further asserted that based upon conversations with Claude A. Verbal, II, he was led to believe that Margie H. Verbal was aware of the civil matter and his representation of them

On the totality of the circumstances as presented to Wilson, particularly noting that Claude was a co-owner of the property rented to plaintiff, Claude was Margie's son, and Margie did not live in North Carolina, we hold that Claude Verbal's retention of Wilson as legal counsel on behalf of Margie was within Claude's apparent authority. *See id.*; *see also Parsons v. Bailey*, 30 N.C. App. 497, 502, 227 S.E.2d 166, 168 (1976) ("It would seem to be clear that if the agent is purporting to act as an agent and doing the things which such agents normally do, and the third person has no reason to know that the agent is acting on his own account, the principal should be liable because he has invited third persons to deal with the agent within the limits of what, to such third persons, would seem to be the agent's authority."); *compare Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 533, 463 S.E.2d 397, 400 (1995) (holding an attorney had no right to appear on behalf of the defendant where the attorney had no authority granted by the party for whom he was appearing).

[2] We next consider whether Wilson, appearing on behalf of Margie, appeared before the trial court in a manner consistent with a general appearance.

"A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action" N.C. Gen. Stat. § 1-75.7(1) (2013). "In G.S. § 1-75.7 the legislature made the policy decision that any act which constitutes a general appearance obviates the necessity of service of summons." *Simms v. Stores, Inc.*, 285 N.C. 145, 157, 203 S.E.2d 769, 777 (1974).

A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. Other than a motion to dismiss for lack of jurisdiction virtually any action constitutes a general appearance.

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Judkins v. Judkins, 113 N.C. App. 734, 737, 441 S.E.2d 139, 140 (1994) (citations and quotations omitted). “A party may appear either in person or by attorney in actions or proceedings in which he is interested.” N.C. Gen. Stat. § 1-11 (2013). “[A] court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction.” *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 336, 714 S.E.2d 770, 774 (2011) (citation omitted).

The record reflects that following the filing of plaintiff’s complaint, Wilson filed an answer on behalf of Claude and Margie answering the allegations of the complaint and raising defenses of contributory negligence, no proximate cause, failure to mitigate, and unclean hands. The answer also included a motion to dismiss the complaint pursuant to Rule 12(b)(6). Moreover, Wilson represented defendants on plaintiff’s motion to compel depositions and for sanctions. The parties entered into a settlement which led to the trial court’s entry of a consent order. Clearly, the trial court had jurisdiction over the subject matter, a fact that Margie does not contest. Wilson’s representation constituted a general appearance submitting Margie to the jurisdiction of the court. Therefore, Margie has waived her right to challenge the trial court’s exercise of personal jurisdiction. See N.C.G.S. § 1-75.7(1); see also *Lynch v. Lynch*, 302 N.C. 189, 197, 274 S.E.2d 212, 219 (“[A]ny act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court’s exercise of personal jurisdiction over the party making the general appearance.”) *on reh’g*, 303 N.C. 367, 279 S.E.2d 840 (1981).

Due to our holding affirming the trial court’s exercise of personal jurisdiction based on an agency relationship, we need not address Margie’s additional arguments challenging the trial court’s exercise of personal jurisdiction.

II

Next, Margie argues that the trial court erred in denying her motion to set aside the default judgment. Specifically, she argues that because “the procedural manner by which [personal] jurisdiction . . . could have been exercised over her was never legally accomplished . . . the Default Judgment entered against her is void.”

As we have determined that Wilson’s representation of Margie before the trial court was proper and constituted a general appearance submitting Margie to the jurisdiction of the court, we overrule this argument.

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Affirmed.

Judges HUNTER, Robert C. and STEELMAN concur.

DAVID R. COX, PLAINTIFF

v.

**TOWN OF ORIENTAL AND BOARD OF COMMISSIONERS OF THE
TOWN OF ORIENTAL, DEFENDANTS**

No. COA13-1222

Filed 1 July 2014

1. Appeal and Error—reply brief—surreply brief

The Court of Appeals declined to consider plaintiff's reply brief, and thus, had no reason to consider defendants' surreply brief.

2. Jurisdiction—standing—not an aggrieved person

The trial court did not err by dismissing plaintiff's appeal and action for declaratory judgment based on lack of standing. Plaintiff provided no factual basis to support the argument that he was an aggrieved person.

Appeal by Plaintiff from Orders entered 10 April 2013 by Judge Benjamin G. Alford in Pamlico County Superior Court. Heard in the Court of Appeals 23 April 2014.

McCotter Ashton, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for Plaintiff.

Davis Hartman Wright, PLLC, by Michael Scott Davis and I. Clark Wright, Jr., for Defendants.

STEPHENS, Judge.

Procedural History and Factual Background

This case arises from the decision of the Town of Oriental and its Board of Commissioners (collectively, "Defendants") to permanently close Avenue A and a portion of South Avenue, public rights of way in the Town. On 2 August 2012, Plaintiff David R. Cox filed an appeal from

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the Town ordinance vacating Avenue A and an action for declaratory judgment in Pamlico County Superior Court.¹ In his appeal and action, Plaintiff alleged the following relevant facts:

The Town sits on the Neuse River. On 13 January 2012, the Board met to consider “the possibilities of sale or exchange of property in the vicinity of the [W]est end terminus of South Avenue and Avenue A.” South Avenue and Avenue A are situated on a peninsula that borders the Neuse River on the South and a tributary called Raccoon Creek on the West. Raccoon Creek is the location of the Town’s harbor.

Chris Fulcher wrote to the Town Manager on 23 January 2012 and proposed to exchange a portion of his property on the Raccoon Creek side of the peninsula (“the Raccoon Creek property”) for the Town’s interest in Avenue A and the South Avenue terminus. Fulcher owns all property on either side of Avenue A and the South Avenue terminus. The Board voted to accept the proposal on 10 February 2012 and executed a contract on 23 May 2012. The contract indicated that the transfer would not occur if the Board determined that it was not in the Town’s best interests. On 3 July 2012, the Board voted to close Avenue A. The Board declined to vacate the South Avenue terminus at that time.

Plaintiff is a “taxpaying resident[] of the Town” and owns property approximately three blocks North of Avenue A and the South Avenue terminus. Plaintiff’s property does not touch Avenue A, South Avenue, or the Raccoon Creek property. On 2 August 2012, Plaintiff appealed the Board’s decision to close Avenue A and sought a declaratory judgment regarding the Town’s authority to close either Avenue A or the South Avenue terminus. Plaintiff filed an amendment to that action on 4 September 2012, seeking to add the Board as a party to the action and seeking “injunctive and/or declaratory relief” for a number of alleged open meetings and public records violations. Defendants responded with an answer and affirmative defenses on 2 October 2012. Four months later, on 11 February 2013, Defendants filed motions to dismiss Plaintiff’s “appeal, action for declaratory judgment, and amendment,” or, in the alternative, for judgment on the pleadings.

1. According to Plaintiff’s 2 August 2012 appeal and action, the ordinance operated to vacate only Avenue A, not the relevant portion of South Avenue. Plaintiff alleges that he was required to file this action before the Town completed the closing process, however, because of certain procedural restrictions. Thus, this appeal is effective only as it relates to the Town’s closure of Avenue A, not the relevant portion of South Avenue.

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A hearing on the motions was held on 4 March 2013. During the hearing, Defendants argued that Plaintiff lacked standing to bring his suit. Afterward, on 10 April 2013, the trial court entered orders dismissing Plaintiff's appeal of the Board's decision to close Avenue A and granting Defendants' motions to dismiss the declaratory action and for judgment on the pleadings.² Plaintiff appeals to this Court from those orders.

Discussion

On appeal, Plaintiff argues that he (1) stated grounds to support a declaratory judgment in his action, (2) had a statutory right to appeal the Town's decision to vacate Avenue A, and (3) had a right to have his open meetings and public records claims heard. In response, Defendants argue that the trial court properly dismissed Plaintiff's action because Plaintiff lacked standing to file suit and failed to state a claim upon which relief could be granted. We affirm the trial court's orders.

I. Plaintiff's Reply Brief

[1] As a preliminary matter, we address the propriety of Plaintiff's reply brief, filed 20 March 2014. On 3 April 2014, Defendants moved this Court for leave to file a surreply brief or, in the alternative, for oral argument, contending that Plaintiff's reply brief was improper. A proposed surreply brief was attached. Plaintiff filed a response on 8 April 2014, objecting to the motion. On 16 April 2014, we granted Defendants' motion for leave to file a surreply brief, accepting the proposed surreply brief for that purpose, and denied the motion for oral argument. No additional documents have been filed with this Court.

Plaintiff asserts that his reply brief is submitted pursuant to Rule 28(h) and "limited to a concise rebuttal of the arguments . . . contained in [Defendants' b]rief." In his reply brief, Plaintiff seeks to rebut Defendants' contentions that he (1) lacked standing to file suit and (2) failed to state a claim upon which relief could be granted. Given the contents of Plaintiff's principal brief, this discussion violates Rule 28(h) of the North Carolina Rules of Appellate Procedure.

Rule 28(h) states, in pertinent part, that:

. . . Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in

2. The Town closed the South Avenue terminus on 8 July 2013. As a result, Plaintiff filed a second lawsuit against the Town and the Board, appealing the closure of the South Avenue terminus. That suit has not been appealed to this Court. Rather, the trial court stayed the proceedings on that action until this appeal could be resolved.

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the appellee's brief and *shall not reiterate arguments set forth in the appellant's principal brief. . . .*

N.C.R. App. P. 28(h) (emphasis added). In his principal brief, Plaintiff argues that he stated a claim for which relief could be granted under Rule 12(b)(6). He also argues that he had standing to appeal the Town's decision as a "person aggrieved" under N.C. Gen. Stat. § 160A-299 and as a successor in interest to "these public rights of way." Plaintiff's standing argument is less detailed than his 12(b)(6) argument, but clearly supported by authority and reason nonetheless.

As we have previously noted, "[a] reply brief does not serve as a way to correct deficiencies in the principal brief." *State v. Greene*, ___ N.C. App. ___, 753 S.E.2d 397 (2013) (unpublished opinion), available at 2013 WL 5947337 (striking the defendant's reply brief under amended Rule 28(h) because he "merely expand[ed] upon the alleged error raised in his principal brief").³ Plaintiff addressed Rule 12(b)(6) and the standing issue in his principal brief. In addition, standing was raised numerous times by Defendants' counsel during the 4 March 2013 hearing on Defendants' motions to dismiss. If Plaintiff wished to address these issues in greater detail, he should have done so in his principal brief. Accordingly, we decline to consider Plaintiff's reply brief and, thus, have no reason to consider Defendants' surreply brief.

II. Standing

[2] Defendants contend that the trial court properly dismissed Plaintiff's appeal and action for declaratory judgment because Plaintiff lacked standing to bring those actions. Because standing is jurisdictional, we address Defendants' argument as a threshold matter. See, e.g., *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) ("Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved.") (citations, internal quotation marks, and brackets omitted). After a thorough review of the record, we conclude that the trial court properly dismissed Plaintiff's actions for lack of standing.

Section 160A-299 provides in pertinent part that:

(b) Any person aggrieved by the closing of any street or alley . . . may appeal the . . . order to the General Court of Justice within 30 days after its adoption. . . .

3. *Greene* is an unpublished opinion and, therefore, lacks precedential value. N.C.R. App. P. 30(e)(1). Nonetheless, its discussion is well-reasoned and one of the only opinions to address Rule 28(h) as amended (effective 15 April 2013). We find it persuasive.

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N.C. Gen. Stat. § 160A-299(b) (2013). The term “person aggrieved” as it applies to section 160A-299 is not defined in the statute or by our courts. *See id.* Nonetheless, this Court has defined an “aggrieved party” under section 160A and in the context of a zoning ordinance as “one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community, amounting to a reduction in the value of his property.” *In re Granting of Variance by Town of Franklin*, 131 N.C. App. 846, 849, 508 S.E.2d 841, 843 (1998) (citation omitted) (noting that the petitioner, an adjoining property owner, “clearly established” that she was an aggrieved party when the town granted a variance from the setback requirements to a group called “Carriage Park Villas”). We believe the same definition is applicable here. *See generally In re Hayes*, 199 N.C. App. 69, 78–79, 681 S.E.2d 395, 401 (2009) (“The primary rule of [statutory] construction is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. To effectuate that intent, statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each.”) (citations, internal quotation marks, ellipses, and brackets omitted), *disc. review denied*, 363 N.C. 803, 690 S.E.2d 694 (2010).

In his appeal from the Town’s decision and action for a declaratory judgment, Plaintiff alleged that he “is a member of the public[] and a taxpaying resident[] of the Town” He also stated that he owns property in “Block No. 13,” which is approximately three blocks away from Avenue A, and asserted that he “is aggrieved” by the Town’s decision. Lastly, Plaintiff alleged that he is a “successor in interest to the dominant tract owner and offeror of dedication to public uses for use as rights of way all such land as is depicted as rights-of-way on the 1900 Town Map, including any subsequent modifications of such rights of ways[.]” On appeal to this Court, Plaintiff argues that he is an aggrieved person due to his status as a “citizen and resident of the Town” and “because he is a successor in interest to these public rights of way, which were designed and dedicated to provide access to the citizens of [the Town] to the public trust waters of the Neuse River, when the Town . . . was laid out [in the year 1900].”⁴ We are unpersuaded.

4. Plaintiff asserts that these allegations “must be accepted by this [C]ourt as being true” under the standard of review applied on appeal from the grant of a motion to dismiss under Rule 12(b)(6). This is incorrect. As Defendants note in their brief, that standard is only applicable to allegations of fact, not law. *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) (“For the purpose of the motion [to dismiss under Rule 12(b)(6)], the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.”).

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Plaintiff has provided no factual basis to support the argument that he is an aggrieved person in this case. His property is not adjacent to Avenue A or South Avenue and was not adjacent to those roads when the Town was designed in 1900. He has not alleged any personal injury and provides no reason to believe that his turn-of-the-last-century predecessor in interest had some special connection to Avenue A or South Avenue *distinct from the rest of the community*. Rather, he couches his arguments in terms of broad, public rights flowing from the Town's inception that have no bearing on our analysis here. Indeed, Plaintiff's entire argument is rooted in his status as a member of the Town's taxpaying populace. Such status is patently insufficient to support an appeal from, or action for declaratory judgment regarding, a town's order closing a street or alley under section 160A-299. *See, e.g., Shaw v. Liggett & Myers Tobacco Co.*, 226 N.C. 477, 477-78, 38 S.E.2d 313, 313 (1946) (stating, before section 160A-299 was enacted, that "[t]he action of a city or town in authorizing the closing of a street[] cannot be successfully challenged in a civil suit instituted by a private citizen whose only interest therein is that of a general taxpayer of the city or town"). Accordingly, we hold that Plaintiff lacked standing to contest the Town's decision and affirm the trial court's orders dismissing his appeal, action, and amended action.

AFFIRMED.

Judges GEER and ERVIN concur.

GEOSCIENCE GROUP, INC., PLAINTIFF

v.

WATERS CONSTRUCTION COMPANY, INC., DEFENDANT

No. 13-1375

Filed 1 July 2014

1. Appeal and Error—preservation of issues—failure to object—quantum meruit

Defendant failed to object to the trial court's jury instructions submitting a claim based upon quantum meruit, and thus, that argument was not subject to appellate review.

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2. Appeal and Error—preservation of issues—failure to object—failure to request special instructions

Where defendant neither objected to the trial court's jury instructions nor requested special instructions in a breach of contract, implied contract, and unjust enrichment case, its challenges to the court's instructions were not preserved for appellate review.

3. Appeal and Error—preservation of issues—motion for judgment notwithstanding verdict—failure to identify issue—failure to cite authority

The court did not err by denying defendant's motion for judgment notwithstanding the verdict. Defendant failed to identify any issue or element for which the evidence was insufficient or cite any authority addressing the sufficiency of evidence of breach of contract or of recovery under quantum meruit.

Appeal by defendant from orders entered 28 December 2012 and 22 February 2013 by Judge Lindsay R. Davis, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 April 2014.

Keziah Gates, LLP, by Andrew S. Lasine, for plaintiff-appellee.

Goodman, Carr, Laughrun, Levine & Greene, PLLC, by Miles S. Levine, for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to object to the trial court's jury instructions submitting a claim based upon *quantum meruit*, that argument is not subject to appellate review. Where defendant neither objected to the trial court's jury instructions nor requested special instructions, its challenges to the court's instructions were not preserved for appellate review. The court did not err by denying defendant's motion for judgment notwithstanding the verdict.

I. Factual and Procedural Background

Waters Construction Company, Inc., (defendant) is the owner of a tract of real estate located in Mecklenburg County known as Lost Tree. In 1986 defendant's owner, William Waters, obtained a zoning permit for Lost Tree that allowed construction of 49 houses. Defendant did not develop the land at that time. In 2008 defendant hired Frank Craig to prepare plans for Lost Tree, and in January 2009 Mr. Craig submitted

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plans to the Charlotte-Mecklenburg planning department. The plans were reviewed by Steve Gucciardi, and were rejected because they did not include the required wetlands delineations and permits. After Mr. Gucciardi reviewed the plans, he and Mr. Waters walked through the property and Mr. Gucciardi showed Mr. Waters the wetlands and streams that were subject to regulation.

After the plans submitted by Mr. Craig were rejected, Mr. Waters hired Wendell Overby to perform a preliminary wetlands review of Lost Tree. In August 2009 Mr. Overby provided Mr. Waters with a preliminary report stating that in his “professional opinion that the stream features [in Lost Tree] were jurisdictional,” meaning that they were subject to regulation. Mr. Overby recommended that “a detailed wetland delineation be performed and jurisdictional features be surveyed for permitting purposes if applicable[,]” and showed Mr. Waters the jurisdictional wetlands and streams.

In the fall of 2009 Mr. Waters met with Kevin Caldwell, plaintiff’s senior vice president, about the possibility of Mr. Caldwell’s revising the plans submitted by Mr. Craig. Mr. Waters wanted plaintiff to produce a set of plans for development of all 49 lots that were approved in 1986, although this would require two stream crossings. After Mr. Caldwell and Mr. Waters held several meetings to discuss “the layout of the subdivision” “in terms of these stream crossings and the impact of the buildable lots,” they signed a contract for plaintiff to “design the roads, the water facility, [and] the storm drainage for [the] 49 lots depicted on [defendant’s] rezoning petition.” The parties agreed to a contract price of \$24,000, with half to be paid when plaintiff submitted plans to the city and the remainder when the plans were approved. The contract provided that plaintiff was responsible for producing preliminary plans depicting the location of roads, sewage and storm drains in the subdivision, and for civil engineering plans for grading and control of erosion, and that defendant was responsible for surveying and delineating any “wetlands with jurisdictional streams” and providing plaintiff with this information. The contract stated that if “additional service work” were required, “a work order (fee addendum) will be presented to [defendant] for authorization prior to proceeding with the additional work.” “Additional services” were defined in the contract as work that was “[b]eyond the scope of the basic civil services to be performed for this proposal” including “wetland delineation/investigation” and “[p]lan revisions initiated by [defendant]” after plaintiff had begun work.

The contract was signed on 29 October 2009. Mr. Caldwell met with Mr. Waters several times during November 2009, but Mr. Waters did not

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provide Mr. Caldwell with Mr. Overby's report or with any documentation delineating the wetlands or stream crossings in Lost Tree. Plaintiff submitted plans in early December 2009, which were again rejected because they failed to delineate the wetlands or address related issues. After the plans were rejected, Mr. Waters told Mr. Caldwell about Mr. Overby's report and defendant hired Mr. Overby to prepare a detailed report delineating the jurisdictional streams and wetland areas, so that Mr. Caldwell could develop revised plans.

After Mr. Overby delineated the Lost Tree wetlands, plaintiff identified five alternative approaches for revised plans that addressed wetland issues, and provided defendant with a memo setting out these alternatives and indicating the effect on construction costs of each choice. After meeting to discuss which approach defendant preferred, Mr. Waters directed Mr. Caldwell to prepare plans that would allow development of all 49 building lots, and to first submit the least expensive option. When these plans were rejected, Mr. Caldwell prepared another set of plans using the second least expensive option. He also prepared new plans for the development that adjusted the road elevation, storm water drainage, and sewer pipes to accommodate the revised approach to wetlands and stream crossings. These plans were ultimately approved by "both the City and Charlotte-Mecklenburg Utility Department."

After the plans were approved, Mr. Caldwell sent Mr. Waters an invoice for the additional cost of preparing revised plans. Plaintiff had been paid \$12,000 at the outset of the project, and sought an additional \$38,000. Plaintiff contended that the additional work was not within the scope of the parties' contract, but constituted "additional services" as defined in the contract. Mr. Waters refused to pay the additional amount, claiming that the work performed was within the scope of their agreement.

On 26 April 2011 plaintiff filed a complaint against defendant, seeking damages based upon breach of contract, implied contract, and unjust enrichment. The case was tried before a jury at the 5 November 2012 session of Superior Court for Mecklenburg County. The trial testimony of Mr. Caldwell and Mr. Waters agreed with respect to the general sequence of events described above, but differed sharply in regards to the scope of work covered by the contract.

Mr. Caldwell testified that he had asked Mr. Waters for documentation regarding delineation of wetlands before he prepared the first set of plans, but that Mr. Waters had told him that he had "a letter" that exempted defendant from compliance with wetlands regulations, and

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told him to “go ahead and submit the plans,” promising that he would provide plaintiff with the letter “while the plans were being reviewed.” However, Mr. Waters never showed Mr. Caldwell such a letter. Mr. Waters denied telling Mr. Caldwell that he had a letter waiving wetlands requirements.

Mr. Waters conceded that (1) after Mr. Craig’s plans were rejected because they failed to delineate wetlands, he had hired Mr. Overby to produce a preliminary report; (2) Mr. Overby’s preliminary report concluded that there were jurisdictional streams and wetlands areas on the Lost Tree property; (3) Mr. Overby gave him this report in August 2009; (4) Mr. Waters did not show Mr. Caldwell the report until after the first set of plans plaintiff produced were rejected for failure to delineate wetlands, and (5) Mr. Waters did not hire Mr. Overby to prepare a detailed report with the required delineation of wetlands until December 2009, after plaintiff’s plans were rejected. However, Mr. Waters denied that he had withheld any information from Mr. Caldwell.

Mr. Caldwell testified that when he and Mr. Waters discussed the additional cost of revised plans, Mr. Waters told him “that money’s no problem, you just get the plans approved.” Mr. Caldwell considered Mr. Waters’s statement to constitute “a handshake agreement” and testified that he “didn’t see the need for a written agreement[.]”

Q. . . . [D]id you ask for a written amendment to the contract or written change order for the contract?

A. At that time we were going through various . . . options. I couldn’t put a number on how much it would cost, but he’s sitting across the table from me saying money is not a problem, you just get the plans approved, and I took the man at his word.

Mr. Waters admitted making the statement that “money is no problem,” but testified that:

A. . . . I made that comment. He asked me if money was a problem. At the time we was right in the depth of a recession and there was hardly any work going on, and I thought he meant was we going to finish the project[.] . . . I said money’s not the problem. . . . I didn’t even understand what he was talking about. . . .

Q. So there was never a handshake agreement between you Mr. Caldwell that you were going to pay whatever additional expenses he incurred above the 24,000?

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A. I had no reason to. He was supposed to do the job for \$24,000. . . . When you're contractor, that ain't the way it works. You take it for a fixed price and that's what you deliver at.

Mr. Waters testified that Mr. Caldwell "said he would finish up the plans and submit it and get it approved for \$24,000, so I took the deal." He never discussed with Mr. Caldwell the procedure that would be followed if additional work was required, testifying that:

He had a contract to do all the work for \$24,000. It didn't make any difference to me what he had to do. At the time he signed the contract, I didn't know what he had to do other than get the plan finished and get it approved.

Mr. Waters admitted meeting with Mr. Caldwell in January 2010 to discuss options for addressing wetlands issues, but testified that they never discussed additional costs, and that he "didn't know anything about any additional costs" until Mr. Caldwell sent him a bill in June 2010. There was a conflict in the parties' evidence concerning the scope of their contract and whether the provision for written change orders had been abandoned.

On 8 November 2012 the jury returned verdicts finding in relevant part that:

1. Defendant breached its contract with plaintiff by failing to pay the full contract price.
2. Defendant owed plaintiff \$12,000 for breach of contract.
3. The parties abandoned the provision of their contract requiring prior written agreement for additional services.
4. Plaintiff was entitled to recover \$26,410 from defendant for additional services.

On 28 December 2012 the trial court entered judgment for plaintiff in accord with the jury's verdict. On 4 January 2013 defendant filed a motion for entry of judgment notwithstanding the verdict (JNOV), pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b). The trial court denied defendant's motion in an order entered 22 February 2013.

Defendant appeals from the judgment and the denial of its motion for JNOV.

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II. Jury InstructionsA. Standard of Review

When a challenge to the trial court's instructions to the jury raises a legal question, it is subject to review *de novo*. See, e.g. *Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc.*, 159 N.C. App. 43, 53, 582 S.E.2d 701, 706-07 (2003) ("The trial court erred in giving the incorrect re-instruction to the jury as a matter of law. Questions of law are reviewable *de novo*.") (citing *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). However, a challenge to a matter within the court's discretion is reviewed for abuse of discretion. "The form and phraseology of issues is in the court's discretion, and there is no abuse of discretion if the issues are sufficiently comprehensive to resolve all factual controversies.." *Barbecue Inn, Inc. v. CP & L*, 88 N.C. App. 355, 361, 363 S.E.2d 362, 366 (1988) (citing *Pinner v. Southern Bell*, 60 N.C. App. 257, 263, 298 S.E. 2d 749, 753 (1983)).

B. Preservation of Defendant's Challenges to Jury Instructions

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states the general rule that "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" and must "obtain a ruling upon the party's request, objection, or motion." Rule 10(a)(2) specifically addresses challenges to jury instructions and provides that:

A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

As a result, a party waives appellate review of jury instructions to which no objection is made at trial:

"Rule 10[(a)](2) of our Rules of Appellate Procedure requiring objection to the charge before the jury retires is mandatory and not merely directory." "[W]here a party fails to object to jury instructions, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error."

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Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 633, 627 S.E.2d 249, 254 (2006) (quoting *Wachovia Bank v. Guthrie*, 67 N.C. App. 622, 626, 313 S.E.2d 603, 606 (1984) (internal quotation omitted), and *Madden v. Carolina Door Controls*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994) (internal quotation omitted).

In addition, Rule 21 of the General Rules of Practice provides in pertinent part that in every jury trial, “the trial judge shall conduct a conference on instructions with the attorneys of record[,]” that an “opportunity must be given to the attorneys . . . to request any additional instructions or to object to any of those instructions proposed by the judge[,]” and that if “special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.” Rule 21 also requires that:

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

If the trial court complies with Rule 21, a party who fails to object to jury instructions or to submit proposed special instructions may not raise the issue on appeal:

Defendant failed to object to the trial court’s instructions [and] . . . did not object after the trial court instructed the jury. Defendant was expressly given the opportunity to object on both occasions in accordance with the provisions of Rule 21 of the General Rules of Practice for the Superior and District Courts. . . . Defendant has not properly preserved this issue for appellate review.

State v. Storm, __ N.C. App. __, __, 743 S.E.2d 713, 716 (2013).

C. Instruction on *Quantum Meruit*

[1] Defendant argues that “the trial court erroneously submitted the issue of *quantum meruit* to the jury” on the grounds that “an express contract governed the relationship of the parties and thus precluded recovery under a *quantum meruit* claim.” We hold that defendant failed to preserve this issue for appellate review.

At trial, defendant objected to the admission of evidence concerning the reasonable value of the additional services provided by plaintiff,

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on the grounds that recovery under a theory of *quantum meruit* was not allowed where an express contract governed the same subject matter. Following the presentation of evidence, the trial court held a conference on proposed jury instructions. The court informed the parties that it intended to instruct the jury on two issues pertaining to plaintiff's breach of contract claim. The court also informed the parties that it intended to submit three issues concerning plaintiff's *quantum meruit* claim for payment for additional services: (1) a special interrogatory asking whether the parties had abandoned the requirement in the contract that all additional work be approved in writing; (2) whether plaintiff had performed additional work; and (3) if so, the amount to which plaintiff was entitled.

Plaintiff objected to the court's submission of the "preliminary issue" of whether the parties had abandoned the contract provision requiring a written change order as a prerequisite to plaintiff's entitlement to recovery under the theory of *quantum meruit*. Plaintiff argued that under *Yates v. Body Co.*, 258 N.C. 16, 128 S.E.2d 11 (1962), it was entitled to an instruction on *quantum meruit* because there was evidence to support recovery under that theory. Defendant proffered *Keith v. Day*, 81 N.C. App. 185, 343 S.E.2d 562 (1986), directing the court's attention to its holding that the plaintiff was not entitled to recover under *quantum meruit* in the absence of a jury finding that the parties had abandoned particular provisions of their express contract. The court denied plaintiff's request to submit the issue of *quantum meruit* without predicated recovery on a finding that the parties had abandoned the written change order requirement. The trial court then asked defendant for any requests or objections, but defendant neither requested any special instructions, nor objected to the trial court's proposed instructions:

THE COURT: Yes. And I haven't heard from [defense counsel] the things that he wants.

[DEFENSE COUNSEL]: I didn't have any changes in what you had.

After the trial court instructed the jury, but before it began its deliberations, the court again offered the parties an opportunity to state specific objections to its instructions, or to request special instructions:

THE COURT: The jury has retired, and I will hear from counsel regarding any objections or requests for additional instructions. [Your] exceptions and objections during the charge conference are already [p]reserved.

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[PLAINTIFF'S COUNSEL]: Yes, sir. Those are my objections and exceptions.

[DEFENSE COUNSEL]: My objections I think were on the whole issue of *quantum meruit* with respect to both cases.

THE COURT: All right. I've considered the arguments previously given on both of those issues or questions that were raised. Your objections are noted.

Because defendant had not objected to the court's proposed instructions, the reference to an objection to "the whole issue of *quantum meruit* with respect to both cases" can only refer to his objection during trial to testimony concerning the reasonable value of plaintiff's services. Defense counsel's reference to an earlier objection to the introduction of certain testimony does not constitute an objection to a specific jury instruction and does not "stat[e] distinctly that to which objection is made and the grounds of the objection" as required by Rule 10 of the Rules of Appellate Procedure. We hold that defendant failed to preserve the challenge to the trial court's instruction on *quantum meruit* for appellate review.

Moreover, even if this issue were properly preserved, we would hold that the trial court did not err. Defendant notes the general rule that "[t]here cannot be an express and an implied contract for the same thing existing at the same time." *Campbell v. Blount*, 24 N.C. App. 368, 371, 210 S.E. 2d 513, 515 (1975) (internal citation omitted). However, it is long established that "[a] written contract may be abandoned or relinquished [by] . . . conduct clearly indicating such purpose[.]" *Bixler v. Britton*, 192 N.C. 199, 201, 134 S.E. 488, 489 (1926) (citations omitted).

The heart of defendant's argument is that plaintiff's own evidence showed an express contract, and that where there is an express contract, no implied contract can exist. We recognize the validity of defendant's argument as to this principle of contract law. [However,] . . . plaintiff's evidence clearly showed that as plaintiff's work on the project progressed, plaintiff . . . was assured that it would be paid for its work. Thus, [because the parties'] . . . conduct clearly indicat[ed] a different understanding, an implied contract could arise between them.

John D. Latimer & Assoc. v. Housing Authority of Durham, 59 N.C. App. 638, 642, 297 S.E. 2d 779, 782 (1982) (citing *Campbell v. Blount*) (other citations omitted).

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Defendant does not acknowledge that even when parties have an express contract recovery based on *quantum meruit* is possible if there is evidence that the parties abandoned the contract, and does not attempt to distinguish the cases addressing this issue. Nor does defendant contest the sufficiency of the evidence on the issue of abandonment. “[T]he evidence warranted a finding . . . that the conduct of the parties clearly indicated that they were not adhering to the written provision of the contract relative to desired changes in construction. Upon abandonment of the quoted provision by the parties, it was proper for the court to allow recovery for the changes on the basis of *quantum meruit* or an implied contract.” *Campbell*, 24 N.C. App. at 371, 210 S.E. 2d at 515-16. Therefore, if we were to review this issue we would hold that the trial court did not err by instructing the jury that, if it found that the parties had abandoned the contractual requirement of written change orders, it could then consider whether plaintiff was entitled to recover based on the reasonable value of its services to defendant.

D. Other Challenges to Jury Instructions

[2] In addition to challenging the trial court’s instruction on *quantum meruit*, defendant contends that the court made a variety of other errors in its instructions to the jury. However, none of defendant’s appellate challenges to the court’s instructions were the subject of an objection or of a request for a special instruction before the trial court. “A party who is dissatisfied with the form of the issues or who desires an additional issue should raise the question at once, by objecting or by presenting the additional issue. If a party consents to the issues submitted, or does not object at the time or ask for a different or an additional issue, he cannot make the objection later on appeal. Because defendant neither objected to the issue submitted to the jury nor asked for a different issue, as the record unequivocally reveals, it cannot do so on this appeal.” *Hendrix v. Casualty Co.*, 44 N.C. App. 464, 467, 261 S.E.2d 270, 272-73 (1980) (citing *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731 (1961) (other citation omitted). Defendant’s arguments concerning other alleged errors in the court’s instructions to the jury are dismissed.

III. Judgment Notwithstanding the Verdict

[3] Finally, defendant argues that the trial court “erred in denying defendant’s motion for judgment notwithstanding the verdict, when the evidence presented to the court was insufficient to support the jury’s verdict.” However, defendant fails to identify any issue or element for which the evidence was insufficient, or to cite any authority addressing the sufficiency of evidence of breach of contract or of recovery under

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quantum meruit. Instead, defendant makes a conclusory argument that the “court’s failure to properly and clearly instruct the jury on the material issues based on the pleadings, considering all evidence presented, substantially prejudiced the defendant and therefore the court’s denial of defendant’s judgment notwithstanding the verdict was improper.”

Moreover, defendant’s motion for JNOV did not allege that plaintiff’s evidence was insufficient, but was based solely on defendant’s contention that the existence of an express contract precluded recovery based on *quantum meruit*. “Such a shift runs contrary to our long standing admonition that parties may not present, nor prevail upon, arguments in the appellate courts that were not argued in the trial court. . . . ‘[T]he law does not permit parties to swap horses between courts in order to get a better mount’ before an appellate court.’” *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 642-43, 652 S.E.2d 231, 239 (2007) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). This argument lacks merit.

For the reasons discussed above, we conclude that the trial court did not err and that its judgment and order should be

AFFIRMED.

Judges HUNTER, Robert C., and BRYANT concur.

GERALDINE GRIER HOUSTON, PLAINTIFF

v.

JUANITA TILLMAN AND THE ESTATE OF CLIFFORD MEDLIN, JR., DEFENDANTS

No. COA13-1094

Filed 1 July 2014

1. Pleadings—motion to amend complaint—denial of motion to dismiss—denial of motion for summary judgment

The trial court did not err in a constructive trust case by granting plaintiff leave to amend her complaint, by denying defendants’ motions to dismiss pursuant to Rule 12(b)(6), and by denying defendants’ motion for summary judgment. Defendants failed to present a specific argument with respect to the motion to amend, plaintiff’s amendment and restatement of the complaint rendered any argument regarding the original complaint moot, and

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defendants' arguments regarding the summary judgment order could not amount to reversible error.

2. Trusts—constructive trust—wrongdoing not a requirement—quantum meruit

The trial court did not err by denying defendants' motion for a directed verdict and motion for judgment notwithstanding the verdict on plaintiff's quantum meruit and constructive trust claims. Plaintiff's quantum meruit claim was not submitted to the jury. Further, wrongdoing is not a requirement for imposing a constructive trust, and the record contained sufficient evidence to support the imposition of a constructive trust.

Appeal by defendants from judgment entered 14 May 2013 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2014.

Paul Whitfield, P.A., by Paul L. Whitfield, for plaintiff-appellee.

John F. Hanzel, P.A., by John F. Hanzel, for defendants-appellants.

GEER, Judge.

The trial court entered judgment in favor of plaintiff Geraldine Grier Houston and against defendants Juanita Tillman and the Estate of Clifford Medlin, Jr. for the sum of \$120,000.00. On appeal, defendants primarily argue that the trial court erred when it imposed a constructive trust on certain property in the absence of defendants' engaging in any wrongdoing. Because "wrongdoing" is not a requirement for imposing a constructive trust and because the record contains sufficient evidence to support the trial court's imposition of a constructive trust, we find no error.

Facts

In about 1989, plaintiff, who was married, met the decedent, Clifford Medlin. Mr. Medlin lived on Miller Avenue in Charlotte, North Carolina (the "Miller Avenue residence"). In 1997, plaintiff's husband moved out of their home on Coburg Avenue in Charlotte (the "Coburg residence"), leaving plaintiff, plaintiff's daughter, and plaintiff's two grandchildren to support themselves. Plaintiff began working, but was forced to stop sometime in 2000 due to a back injury she suffered on the job. Although disabled, plaintiff was able to maintain the mortgage on the Coburg

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residence for some time with rent paid by her daughter who continued to live with her.

After her husband had left, plaintiff's relationship with Mr. Medlin became romantic. Plaintiff and Mr. Medlin sometimes stayed the night at the other's house, and starting in 2001, when Mr. Medlin began a seven-year regimen of dialysis treatments, plaintiff started providing caretaking and in-home nursing services for Mr. Medlin.

In 2004, plaintiff fell behind on her mortgage payments for the Coburg residence, and the bank foreclosed on her home. However, Mr. Medlin acquired title to the Coburg residence in his own name and plaintiff and her family then resumed living at the Coburg residence. Mr. Medlin paid the mortgage on the Coburg residence while plaintiff paid for groceries. In addition, in 2005, Mr. Medlin purchased a new Dodge Stratus and gave it to plaintiff for Mother's Day. While title to the Dodge remained in Mr. Medlin's name, plaintiff was responsible for the car's maintenance.

Mr. Medlin underwent a kidney transplant in 2008. Plaintiff stayed at the hospital for a month with Mr. Medlin while he was recovering. After Mr. Medlin was discharged, plaintiff continued to provide caretaking and in-home nursing services for him. Over the course of their relationship, plaintiff also helped Mr. Medlin when he suffered from gout, a back condition, and problems associated with asbestos in his lungs. Plaintiff also managed Mr. Medlin's finances. Plaintiff estimated that she spent six to seven hours per day for 11 years taking care of Mr. Medlin and providing in-home nursing services.

Mr. Medlin died unexpectedly of a heart attack in early 2012. The day Mr. Medlin died, Mr. Medlin's sister – defendant Tillman – whom plaintiff had never met, arrived at the Miller Avenue residence and declared, "I am in charge here." Ms. Tillman demanded keys to the Miller Avenue residence and the Coburg residence. Being one of Mr. Medlin's heirs, Ms. Tillman applied for and was appointed as the personal representative of Mr. Medlin's estate shortly after his death. Ms. Tillman repossessed the Dodge from plaintiff with the assistance of a uniformed police officer and evicted plaintiff from the Coburg residence, letting the house go into foreclosure. Ms. Tillman also sold the Dodge and placed the proceeds into the estate.

On 8 June 2012, plaintiff filed suit against Ms. Tillman and Mr. Medlin's estate, asserting causes of action for (1) a claim for personal services, (2) constructive trust, parole trust, and (3) parole gift. The complaint sought the sum of \$582,400.00 for personal services rendered

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to Mr. Medlin and the declaration of a constructive or resulting trust with respect to the Coburg residence.

On 16 August 2012, defendants filed a combined motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, motion for summary judgment, and motion for sanctions and attorneys' fees. Plaintiff responded with a motion to amend and restate her complaint.¹ On 2 October 2012, the trial court entered an order deferring ruling on the Rule 12(b)(6) motion, allowing plaintiff leave to file an amended and restated complaint, and declining to rule on defendants' remaining motions. After plaintiff filed an amended and restated complaint on 2 October 2012, defendants, on 30 October 2012, again filed a combined Rule 12(b)(6) motion to dismiss, motion for summary judgment, and motion for sanctions and attorneys' fees. On 10 December 2012, the trial court entered an order denying defendants' motions.

At trial, the trial court instructed the jury solely on plaintiff's request for a constructive trust, submitting three issues to the jury. The jury answered "[y]es" as to the issue whether the Coburg Avenue residence and the Dodge were "subject to a constructive trust in favor of the Plaintiff[.]" The jury also found that "the conduct of the Defendants, Juanita Tillman and The Estate Of Clifford Medlin, Jr., deprived the Plaintiff of a beneficial interest in [the Coburg residence] and the 2005 Dodge Stratus to which the Plaintiff is entitled[.]" Finally, with respect to "[w]hat amount is the Plaintiff . . . entitled to recover from the Defendants . . .[.]" the jury answered: \$120,000.00. The trial court denied defendants' motion for judgment notwithstanding the verdict and entered judgment on 14 May 2013 in accordance with the verdict. Defendants timely appealed to this Court.

I

[1] Defendants first contend that the trial court erred when it granted plaintiff leave to amend her complaint, when it denied defendants' motions to dismiss pursuant to Rule 12(b)(6), and when it denied defendants' motion for summary judgment. However, with respect to the trial court's decision to grant plaintiff's motion for leave to amend her complaint, defendants merely asserted their contention in a heading and presented no specific argument why that ruling was in error. We, therefore, will not address that ruling. *See* N.C.R. App. P. 28(b)(6).

1. Although the record does not explicitly disclose whether or when such a motion was made, we infer from the trial court's 2 October 2012 order that such a motion was made prior to that date.

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With respect to defendants' argument that the trial court erred in denying their motion to dismiss the original complaint, plaintiff's amendment and restatement of the complaint has rendered any argument regarding the original complaint moot. *See Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 525, 715 S.E.2d 285, 287-88 (2011) ("A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") (quoting *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996)); *Hyder v. Dergance*, 76 N.C. App. 317, 319-20, 332 S.E.2d 713, 714 (1985) (noting that "an amended complaint has the effect of superseding the original complaint"). *See also Coastal Chem. Corp. v. Guardian Indus., Inc.*, 63 N.C. App. 176, 178, 303 S.E.2d 642, 644 (1983) (noting trial court found defendant's motion to dismiss plaintiff's original complaint presented "moot question" when trial court granted plaintiff's motion to amend).

With respect to defendants' motion to dismiss the amended complaint, defendants cannot show any prejudice from the denial of their motion as to the first claim for relief based on quantum meruit since the trial court did not submit the quantum meruit claim to the jury. With respect to the constructive trust claim, defendants argue that the trial court erred in failing to dismiss the claim because the amended complaint failed "to allege wrongdoing on the part of Defendants in the acquisition of the property in question which would allow the imposition of a constructive trust." As we explain below, in discussing defendants' arguments regarding its motion for a directed verdict and motion for JNOV, defendants have mistaken the law. Because plaintiff was not required to allege wrongdoing and defendants have made no other argument regarding the sufficiency of the amended complaint, defendants have failed to demonstrate that the trial court erred in denying their motion to dismiss.

Defendants also contend that the trial court erred in denying their motion for summary judgment as to all of plaintiff's claims in the amended complaint. However, "[i]mproper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts" *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Because this case was tried on the merits after denial of defendants' motion for summary judgment, under *Harris*, defendants' arguments regarding the summary judgment order cannot amount to reversible error, and we, therefore, do not address them.

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II

[2] Defendants next contend that the trial court erred in denying their motion for a directed verdict and motion for JNOV as to plaintiff's quantum meruit and constructive trust claims. However, although defendants argue in their brief that plaintiff's evidence in support of her claim based on quantum meruit was insufficient, plaintiff's quantum meruit claim was not submitted to the jury. The sole issue before the jury was plaintiff's entitlement to a constructive trust. As a result, defendants' arguments regarding the quantum meruit claim cannot be a basis for reversal of the judgment below. This aspect of defendants' argument is beside the point. *See Dodd v. Wilson*, 46 N.C. App. 601, 602, 265 S.E.2d 449, 450 (1980) (holding verdict on issues submitted to jury rendered moot court's refusal to submit another issue to jury where refusal did not result in harm to defendant-appellant).

The sole remaining question is whether the trial court erred in denying defendants' motion for a directed verdict and motion for JNOV as to plaintiff's request for a constructive trust. "The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury." *Springs v. City of Charlotte*, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011) (quoting *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009)).

Defendants' only contention with respect to the constructive trust claim is that "for a constructive trust to be imposed, the owner of title has to acquire the property through some sort of wrongdoing" and that, here, "[s]uch wrongdoing was neither alleged nor proven." Defendants argue that since they acquired title to the Coburg residence and the Dodge by operation of intestacy law, they could not have committed wrongdoing because they took no affirmative action to acquire title.

Our Supreme Court's decision in *Variety Wholesalers, Inc. v. Salem Logistics Servs., LLC*, 365 N.C. 520, 723 S.E.2d 744 (2012), sets out the controlling law with respect to constructive trusts. In rejecting this Court's conclusion that the existence of a fiduciary relationship was a requirement for imposition of a constructive trust, the Supreme Court explained:

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“A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.”

Id. at 530, 723 S.E.2d at 751 (emphasis added) (quoting *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970)). The Court noted further that it had “also used the phrase, ‘any other unconscientious manner,’ in describing situations in which a constructive trust may be imposed without a fiduciary relationship.” *Id.* at 531, 723 S.E.2d at 752 (quoting *Speight v. Branch Banking & Trust Co.*, 209 N.C. 563, 566, 183 S.E. 734, 736 (1936)).

Accordingly, *Variety Wholesalers* holds that a trial court may impose a constructive trust, even in the absence of fraud or a breach of fiduciary duty, upon the showing of either (1) some other circumstance making it inequitable for the defendant to retain the funds against the claim of the beneficiary of the constructive trust, or (2) that the defendant acquired the funds in an unconscientious manner. *Id.* at 530-31, 723 S.E.2d at 751-52. *See also id.*, 723 S.E.2d at 752 (noting that “[i]n the absence of [a fiduciary] relationship, [plaintiff] faces the difficult task of proving ‘some other circumstance making it inequitable’ for [defendant] to possess the funds . . .” (quoting *Wilson*, 276 N.C. at 211, 171 S.E.2d at 882)).

Although defendants cite *Variety Wholesalers* and *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), in support of their claim that “some other circumstance” and “unconscientious manner” are synonymous with “wrongdoing,” defendants have not pointed to any language in either case to support their contention.² Indeed, the Supreme Court’s application of the constructive trust doctrine in *Variety Wholesalers* establishes that actual wrongdoing, such as fraud or breach of fiduciary duty, is not necessary for imposition of a constructive trust.

In *Variety Wholesalers*, the plaintiff had contracted with a provider of bill-payment and auditing services. 365 N.C. at 522, 723 S.E.2d at 746. When notified by the bill-payment provider of the amounts the plaintiff

2. *Sara Lee* addressed the interaction of the constructive trust doctrine with the Workers’ Compensation Act, and it is, therefore, irrelevant to our discussion here except insofar as it recites the same general test for imposition of a constructive trust articulated in *Variety Wholesalers*. 351 N.C. at 35, 519 S.E.2d at 313.

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owed to freight carriers, the plaintiff, at the provider's request, would forward the amounts due to a lock-box bank account that, unbeknownst to the plaintiff, was actually owned by the defendant, the provider's lender. *Id.*, 723 S.E.2d at 746-47. The plaintiff claimed that the amounts deposited by the plaintiff were supposed to be paid to the freight carriers. *Id.*, 723 S.E.2d at 747. However, the defendant applied the funds deposited in the lock-box account – which, according to the defendant, were supposed to be funds payable to the provider – towards the principal and interest due on the provider's line of credit. *Id.*

In holding that issues of fact existed regarding the availability of a constructive trust, the Supreme Court did not require proof of actual wrongdoing, but instead held that if the defendant had “*constructive notice* that [the provider] did not have ownership of the funds deposited in the [lock-box] account, [the defendant's] continued acceptance of those funds could be considered unconscientious or inequitable and could thus permit the imposition of a constructive trust.” *Id.* at 531, 723 S.E.2d at 752 (emphasis added). *See also Weatherford v. Keenan*, 128 N.C. App. 178, 179, 493 S.E.2d 812, 813 (1997) (upholding constructive trust in equitable distribution action even absent any mention of fraud, breach of fiduciary duty, or wrongdoing).

In this case, defendants have argued only that “the standard for imposing a constructive trust is that [the] holder of legal title acquired the property through some wrongdoing. Such wrongdoing was neither alleged nor proven” in this case. Since under *Variety Wholesalers*, proof of wrongdoing is not a necessary prerequisite for a constructive trust and since defendants have made no argument that plaintiff's evidence was insufficient to prove, as allowed in *Variety Wholesalers*, some other circumstance making it inequitable for defendants to have retained the Coburg residence and the Dodge, defendants have failed to demonstrate that the trial court erred in denying their motion for a directed verdict and their motion for JNOV. *See also Rape v. Lyerty*, 287 N.C. 601, 615, 215 S.E.2d 737, 746 (1975) (holding constructive trust may be imposed on property received by beneficiaries of decedent's estate to enforce unfulfilled personal services agreement for decedent to devise land to plaintiff); *Rhue v. Rhue*, 189 N.C. App. 299, 307-08, 658 S.E.2d 52, 59 (2008) (upholding constructive trust on certain land parcels when parties had confidential and cohabiting relationship; plaintiff assisted defendant with day-to-day living, managed defendant's finances, cared for defendant's grandson, helped operate defendant's business, and relied on defendant's promise that parcels would be for their mutual benefit; and defendant subsequently denied plaintiff's interest in parcels).

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Defendants have not challenged the trial court's jury instructions or the issues submitted to the jury and have made no other argument for reversal of the judgment below. We, therefore, hold that defendants received a trial free of prejudicial error.

No error.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

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- IN THE MATTER OF THE APPEAL OF BECKY KING PROPERTIES, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF COASTAL COMMUNITIES AT SEAWATCH, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF COASTAL COMMUNITIES DEVELOPMENT, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF COASTAL DEVELOPMENT & REALTY BUILDER, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF DREWMARK INVESTMENTS, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF EAGLE POINT, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF EASTERN CAROLINA'S CONSTRUCTION & DEVELOPMENT, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF GEORGETOWN LAND & TIMBER, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF MAS PROPERTIES, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012
- IN THE MATTER OF THE APPEAL OF McDONALD DEVELOPMENT ASSOCIATES, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

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IN RE APPEAL OF BECKY KING PROPS., LLC

[234 N.C. App. 699 (2014)]

IN THE MATTER OF THE APPEAL OF OCEAN ISLE PALMS, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF POINTE WEST, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF REMUDA RUN, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF RIVERS EDGE GOLF CLUB & PLANTATION, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF SEASCAPE AT HOLDEN PLANTATION, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF SEAWATCH AT SUNSET HARBOR, LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

IN THE MATTER OF THE APPEAL OF WILLIAM E. SAUNDERS JR., TRUSTEE FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2012

No. COA 13-1107

Filed 1 July 2014

Appeal and Error—interlocutory orders and appeals—Property Tax Commission—no substantial right exception—subject matter jurisdiction

The County's appeal from interlocutory orders of the Property Tax Commission (Commission) were dismissed. Appeals from the Commission are not subject to a "substantial right" exception, and the County's contentions that the Commission lacked subject matter jurisdiction to enter the orders, and that the orders were therefore void, did not create a right to immediate review of the orders.

Appeal by Brunswick County from orders entered by the Property Tax Commission on 17 May 2013. Heard in the Court of Appeals 4 March 2014.

Elaine Jordan for taxpayer-appellees.

IN RE APPEAL OF BECKY KING PROPS., LLC

[234 N.C. App. 699 (2014)]

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Jamie S. Schwedler and Office of County Attorney, by Bryan W. Batton for defendant-appellant.

STEELMAN, Judge.

Where the County appeals from interlocutory orders of the Property Tax Commission, its appeals must be dismissed. Appeals from the Commission are not subject to a “substantial right” exception, and the County’s contentions that the Commission lacked subject matter jurisdiction to enter the orders, and that the orders are therefore void, do not create a right to immediate review of the orders.

I. Factual and Procedural Background

In 2012 appellant Brunswick County (“County”) conducted a revaluation of real property in the county for purposes of establishing *ad valorem* property tax assessments. Following the revaluation, taxpayers Becky King Properties, LLC; Coastal Communities at Seawatch, LLC; Coastal Communities at Ocean Ridge Plantation, LLC; Coastal Communities Development, LLC; Coastal Development & Realty Builder, LLC; Drewmark Investments, LLC; Eagle Point, LLC; Eastern Carolina’s Construction & Development, LLC; Georgetown Land & Timber, LLC; MAS Properties, LLC; McDonald Development Associates, LLC; Ocean Isle Palms, LLC; Pointe West, LLC; Remuda Run, LLC; Rivers Edge Golf Club & Plantation, LLC; SeaScape at Holden Plantation, LLC; Seawatch at Sunset Harbor, LLC; and William E. Saunders Jr., Trustee (collectively, Taxpayers) appealed to the Brunswick County Board of Equalization and Review. In early July 2012 the Board of Equalization and Review mailed decisions to Taxpayers, denying their appeals. On 1 August 2012 Taxpayers sent notices of appeal to the North Carolina Property Tax Commission (“Commission”) via United Parcel Service Next Day Air. Commission received Taxpayers’ notices of appeal on 2 August 2012.

On 13 August 2012 County filed motions to dismiss Taxpayers’ appeals to Commission for failure to file their appeals in a timely manner. N.C. Gen. Stat. § 105-290(e) requires that a notice of appeal “from a board of equalization and review shall be filed with the Property Tax Commission within 30 days after the date the board mailed a notice of its decision to the property owner.” County asserted that Taxpayers filed their notices of appeal on the 31st day and thus failed to comply with the 30 day requirement. On 19 October 2012 Commission conducted

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a hearing on County's motions to dismiss. At the end of the hearing, Commission indicated that it would grant County's motions for dismissal. The record reflects that on 14 December 2012 Commission entered an order granting County's motion to dismiss the appeal of Becky King Properties. Becky King Properties filed a notice of appeal and exceptions on 11 January 2013.¹

On 17 May 2013 Commission filed orders reversing its October 2012 dismissal of Taxpayers' appeals to Commission. The orders are identical except for the names of the taxpayers, and state that:

During the March 12, 2013 Administrative Session of Hearings, the Property Tax Commission ("Commission"), on its own motion, reviewed the dismissal of this appeal, and for good cause shown, now deems it appropriate to deny Brunswick County's motion to dismiss the matter. It is therefore ordered and decreed that Brunswick County's motion to dismiss this appeal is denied in all respects.

On 14 June 2013 County filed notices of appeal from Commission's orders reversing its earlier rulings and denying County's motions to dismiss Taxpayers' appeals to Commission.

On 7 November 2013 the North Myrtle Liquidating Trust ("Trust") filed a motion in this Court seeking to substitute itself for certain taxpayers for purposes of this appeal. Trust asserted that five taxpayers (Coastal Communities at Ocean Ridge Plantation, LLC; Drewmark Investments, LLC; Eagle Point, LLC; McDonald Development Associates, LLC; and Ocean Isle Palms, LLC) had conveyed all of their properties to Trust, and that seven other taxpayers (Becky King Properties, LLC; Coastal Communities at Seawatch, LLC; Coastal Communities Development, LLC; Eastern Carolina's Construction & Development, LLC; MAS Properties, LLC; Rivers Edge Golf Club & Plantation, LLC;

1. The parties stipulate that Commission also entered orders dismissing the appeals of the other seventeen taxpayers, and that these taxpayers also filed notices of appeal and exceptions. These orders and notices of appeal are not to be found in the record. As a result, we have no way to determine whether these taxpayers filed timely notices of appeal to this Court. Nor does the record include any documents indicating whether the appeals of any taxpayers (other than those whose properties were later purchased by the North Myrtle Liquidating Trust) were perfected or whether any of these taxpayers sought to withdraw their appeals. "[T]his Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it." *State v. Lawson*, 310 N.C. 632, 641, 314 S.E.2d 493, 499 (1984) (citing *State v. Gibbs*, 297 N.C. 410, 255 S.E. 2d 168 (1979) (other citations omitted)). However, we have resolved this case based on the interlocutory nature of County's appeal, despite these omissions from the record.

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and Seawatch at Sunset Harbor, LLC) had conveyed some but not all of their properties to Trust. On 22 November 2013 Trust's motion was allowed. On 9 December 2013 Trust filed a motion for dismissal of its appeal with respect to properties owned by Trust. The motion asserted that Trust and County had "resolved their dispute by settlement" with regard to properties owned by Trust, and that as "a condition of settlement, the Trust agreed to dismiss its challenge to the County's 2012 tax assessments of the Trust properties" and that County had "agreed to dismiss [its] appeal as it concerns the Trust Properties." This motion was granted on 11 December 2013, so the present appeal concerns only the properties that were not transferred to Trust.

II. Interlocutory Appeal

We first address Taxpayers' argument that County's appeal should be dismissed as interlocutory. "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. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Commission's orders denying County's motions to dismiss Taxpayers' appeals to Commission are interlocutory, as Taxpayers' challenges to County's revaluation of their properties remain unresolved.

Appeal from an order of Commission to this Court is governed by N.C. Gen. Stat. § 7A-29(a), which provides that "[f]rom any final order or decision of . . . the Property Tax Commission under G.S. 105-290 and G.S. 105-342 . . . appeal as of right lies directly to the Court of Appeals." The statute expressly limits the right of appeal to appeals from a "final order or decision." Moreover, N.C. Gen. Stat. § 7A-29 does not make an exception for interlocutory orders in which a substantial right of the appellant is in jeopardy. Therefore, we do not consider County's argument that it is entitled to immediate review to protect its "substantial right" to avoid the waste of "significant resources."

County asserts that after Taxpayers entered notices of appeal, Commission was divested of jurisdiction and lacked subject matter jurisdiction to enter the subsequent orders reversing its earlier dismissal of Taxpayers' appeals. However, an appellant does not obtain a right to immediate review of an interlocutory order simply by arguing that the tribunal lacked subject matter jurisdiction to enter the interlocutory order. *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001) ("denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately

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appealable”) (citing *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982)).

County also attempts to draw a distinction between appeals from the denial of a motion to dismiss based on lack of subject matter jurisdiction and an appeal based on a party’s assertion that an order was “void.” However, we agree with Taxpayers that “[t]here is no such distinction” given that “a trial tribunal order issued without subject-matter jurisdiction is void — that’s the very effect of lack of subject-matter jurisdiction and the most common reason for an order being void.”

County argues that “[v]oid orders are not analyzed as ‘final’ or ‘interlocutory’ on appeal[.]” None of the cases that County cites in support of this position hold that an unappealable interlocutory order will be reviewed by this Court merely because an appellant raises the argument that the underlying order was “void.”² For example, County relies heavily upon *Stroupe v. Stroupe*, 301 N.C. 656, 273 S.E.2d 434 (1981), and asserts that in *Stroupe*, our Supreme Court “noted that the judgment appealed from was interlocutory, then analyzed whether a direct or indirect attack was permissible without requiring the order to be final” and that *Stroupe* found “an interlocutory order void on appeal.” However, although the order at issue in *Stroupe* had been interlocutory when it was originally entered, the appeal was taken from a final judgment. *Stroupe* did not address the appeal from an interlocutory order, and did not hold that if a party asserts that an order is void, this argument confers upon the party a right of immediate review of an interlocutory order. Similarly, County contends that in *In re Officials of Kill Devil Hills Police Dep’t*, __ N.C. App. __, 733 S.E.2d 582 (2012), this Court “vacat[ed an] interlocutory order . . . without requiring the order to have been final.” However, as discussed above, an “interlocutory order is one made during the pendency of an action[.]” *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. In *Kill Devil Hills*, the trial court had entered an order *sua sponte*, although there was no case before it. Therefore, the order was not “interlocutory” because there was no action during the “pendency” of which an order could be entered. County has also quoted selected excerpts from a number of other cases, discussing the general nature of a void order. None of the cited cases suggest that an immediate appeal lies from an interlocutory order based on the fact that the appellant has contended the challenged order was void. Moreover, we have previously dismissed

2. If an interlocutory appeal were subject to immediate review whenever an appellant asserted that the interlocutory order was “void,” this exception would be likely to swallow the rule.

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interlocutory appeals in which the appellant argued that the trial court's order was void. *See Johnson v. Lucas*, 168 N.C. App. 515, 517, 608 S.E.2d 336, 338 (noting that the appellant had raised several issues, including whether "the prior judgment was void" but holding that "in light of our conclusion that this appeal should be dismissed as interlocutory, we do not reach any of the remaining issues"), *aff'd per curium*, 360 N.C. 53, 619 S.E.2d 502 (2005), and *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989) (dismissing the plaintiff's first appeal as interlocutory and later holding, after final judgment was entered, that the challenged order was void).

The issue before us is not whether County is correct that Commission lacked subject matter jurisdiction and thus entered void orders, or whether Taxpayers are correct that Commission had authority to enter the challenged orders under N.C. Gen. Stat. § 105-345(c). Nor does the resolution of this case depend upon the extent of this Court's "inherent authority to set aside void orders," the right to collaterally attack a void order, or the legal effect of the determination that an order is void. Rather, the question is whether the validity of Commission's orders – which are clearly interlocutory – is properly before us at this time. We hold that County has attempted to appeal from interlocutory orders that are not subject to immediate review, that the "substantial right" exception is not applicable to an appeal from Commission, and that County's argument that Commission's orders are void for lack of subject matter jurisdiction does not confer a right of immediate appeal on County.

This appeal must be dismissed.

DISMISSED.

Judges McGEE and ERVIN concur.

IN RE B.S.O.

[234 N.C. App. 706 (2014)]

IN THE MATTER OF B.S.O., V.S.O., R.S.O., A.S.O., Y.S.O.

No. COA14-186

Filed 1 July 2014

1. Termination of Parental Rights—grounds—abandonment—notice—deportation

The trial court did not err by terminating respondent father's parental rights. The allegation of abandonment was sufficient to put respondent on notice of a potential adjudication under N.C.G.S. § 7B-1111(a)(7). Respondent's arrest and subsequent deportation did not prevent him from communicating with his children and Mecklenburg County Youth and Family Services.

2. Termination of Parental Rights—grounds—neglect

The trial court did not err by terminating respondent mother's parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1). The evidence and the court's evidentiary findings were sufficient to show a probability of a repetition of neglect. Respondent failed to address her mental health issues and emotional instability, and respondent had not resolved the issues of improper supervision and domestic violence that led to the children's removal from her home.

Appeal by respondents from order entered 12 November 2013 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 11 June 2014.

Twyla Hollingsworth-Richardson for petitioner-appellee Mecklenburg County Department of Social Services, Division of Youth and Family Services.

Smith Moore Leatherwood LLP, by Carrie A. Hanger, for guardian ad litem.

Appellate Defender Staples Hughes by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant mother.

Rebekah W. Davis for respondent-appellant father.

STROUD, Judge.

IN RE B.S.O.

[234 N.C. App. 706 (2014)]

Respondent-parents appeal from an order terminating their parental rights to the minor children B.S.O. (“Brandy,” born April 2009), V.S.O. (“Vincent,” born May 2006), R.S.O. (“Ronald,” born May 2005), A.S.O. (“Adam,” born January 2004), and Y.S.O. (“Yvonne,” born April 2010).¹ Because respondent-father is not the father of Adam or Yvonne, his appeal does not involve these children. We note that the district court also terminated the parental rights of Yvonne’s father, Jose S., and Adam’s putative father, Orlando V., neither of whom are parties to this appeal.

I. Procedural History

Mecklenburg County Youth and Family Services (“YFS”) obtained non-secure custody of Brandy, Vincent, Ronald and Adam on 14 October 2009, and of Yvonne on 9 April 2010. The district court adjudicated the four elder children neglected and dependent juveniles on 10 December 2009, and entered adjudications of neglect and dependency as to Yvonne on 5 May 2010. As we noted in respondents’ previous appeal, YFS “first became involved with the family in February of 2006 based on reports of inappropriate discipline and domestic violence. YFS remained involved with the family over the course of the next several years.” *In re B.S.O.*, ___ N.C. App. ___, ___, 740 S.E.2d 483, 484 (2013).

YFS filed petitions to terminate respondents’ parental rights on 9 May 2011. The district court held its initial hearing on the petitions between 5 January and 16 March 2012 and entered an order terminating respondents’ parental rights on 18 April 2012. On appeal, we reversed the order and remanded to the district court for consideration of respondent-mother’s motion to re-open the evidence, which she filed prior to entry of the termination order. *In re B.S.O.*, ___ N.C. App. at ___, 740 S.E.2d at 486-87. The court allowed respondent-mother’s motion and received additional evidence in the cause on 18 July and 30 September 2013. By order entered 12 November 2013, the court again concluded that grounds existed to terminate respondents’ parental rights and determined that termination was in the best interests of the minor children. Respondents filed timely notices of appeal.

II. Standard of Review

Respondents challenge the district court’s adjudication of grounds to terminate their parental rights under N.C. Gen. Stat. § 7B-1111(a) (2013). In reviewing the trial court’s decision, we must determine whether the

1. We will refer to the juveniles by pseudonym to protect their privacy.

IN RE B.S.O.

[234 N.C. App. 706 (2014)]

findings of fact are supported by clear, cogent and convincing evidence, and whether the findings support the court's conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). "If there is competent evidence, the findings of the trial court are binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). An appellant is bound by any unchallenged findings of fact. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Moreover, "erroneous findings unnecessary to the determination do not constitute reversible error" where the adjudication is supported by sufficient additional findings grounded in competent evidence. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). We review conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

Respondents challenge each of the grounds for termination found by the district court. However, it is well established that any "single ground . . . is sufficient to support an order terminating parental rights." *In re J.M.W.*, 179 N.C. App. 788, 789, 635 S.E.2d 916, 917 (2006). Therefore, if we determine that the court properly found one ground for termination under N.C. Gen. Stat. § 7B-1111(a), we need not review the remaining grounds. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003).

III. Respondent-father's Appeal

[1] Respondent-father argues the district court erred in terminating his parental rights based on an adjudication of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) (2013). Respondent-father contends that he was not afforded notice of his need to defend this ground at the termination hearing because the petitions filed by YFS did not specifically allege willful abandonment under subpart (a)(7). *See In re C.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007). We disagree.

The Juvenile Code requires a motion or petition for termination of parental rights to allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [in N.C. Gen. Stat. § 7B-1111(a)] exist." N.C. Gen. Stat. § 7B-1104(6) (2013). While the allegations "need not be exhaustive or extensive[.]" this Court has held that "they must be sufficient to put a party on notice as to what acts, omission or conditions are at issue." *In re T.J.F.*, ___ N.C. App. ___, ___, 750 S.E.2d 568, 569 (2013) (citation and quotation marks omitted). Moreover,

[w]hen the petition alleges the existence of a particular statutory ground and the court finds the existence of a

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ground not cited in the petition, termination of parental rights on that ground may not stand unless the petition alleges facts to place the parent on notice that parental rights could be terminated on that ground.

Id.

Under N.C. Gen. Stat. § 7B-1111(a)(7), parental rights may be terminated if “[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]” N.C. Gen. Stat. § 7B-1111(a)(7). “It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

The petitions filed by YFS on 9 May 2011 alleged that respondent-father, *inter alia*, “abandoned said juvenile[s] in that . . . [he] was deported to Mexico . . . after being incarcerated on September 3, 2010. [His] current whereabouts are unknown.” (emphasis added). The petitions further alleged that respondent-father, “for a continuous period of more than (6) months next preceding the filing of the petition[s], ha[d] willfully failed for such period to pay a reasonable portion of the cost of care for said juvenile[s.]”² Although YFS referred to respondent-father’s abandonment of the children in the context of alleging that he “neglected said juvenile[s] as defined in G.S. Section 7B-101(15)[,]” the petitions explicitly asserted that respondent-father had, in fact, “abandoned” his children. Coupled with allegations that his whereabouts were unknown since his incarceration and deportation in September 2010 – approximately eight months before the petitions were filed – we believe the allegation of abandonment was sufficient to put respondent-father on notice of a potential adjudication under N.C. Gen. Stat. § 7B-1111(a)(7). *Cf. In re T.J.F.*, ___ N.C. App. at ___, 750 S.E.2d at 569 (“While the better practice would have been to specifically plead termination pursuant to section 7B-1111(a)(7), we conclude the petition here sufficiently alleged facts to place respondent-father on notice that his parental rights may be terminated on the basis that he abandoned his child.”).

Respondent-father also argues that the evidence and the district court’s findings of fact are insufficient to establish that he willfully abandoned the minor children in the six months immediately preceding

2. See N.C. Gen. Stat. § 7B-1111(a)(3) (2013).

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YFS's filing of the petition, as required by N.C. Gen. Stat. § 7B-1111(a)(7). He contends that "neither the findings nor the evidence address[es] his intent or the six month time period prior to the filing of the termination petition."

To establish grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(7), YFS was required to show that respondent-father had willfully abandoned his children during the "determinative period" from 9 November 2010 to 9 May 2011, the date it filed its petitions. *In re S.R.G.*, 195 N.C. App. 79, 84-85, 671 S.E.2d 47, 51-52 (2009). "Abandonment implies conduct on the part of the parent which manifests a willful determination to [forgo] all parental duties and relinquish all parental claims to the child." *In re Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). "[T]he findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child." *In re S.R.G.*, 195 N.C. App. at 87, 671 S.E.2d at 53.

Rearranged for clarity, the district court's findings reflect the following facts regarding respondent-father's conduct during the six months that preceded the filing of the termination petitions in May 2011:

59. [Respondent-father] was incarcerated for no operator license offense on 3 September 2010 and deported [to Mexico].

60. He returned to Charlotte at some point in March 2012. . . .

. . . .

47. While in Mexico, [respondent-father] was in contact with the social worker on at least one occasion. During the time [respondent-father] was in Mexico, he did not seek to have his three children . . . come live with him in Mexico. He did not offer any other relative placements for the juveniles.

48. While in Mexico, [respondent-father] did not provide any child support for his children. [He] did not provide or offer any financial assistance for the care of his three children. [He] has not provided any or offered any child support for his children since his return to the United States.

. . . .

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52. . . . [Respondent-father] has made no efforts to keep updated on the children while they have remained in custody.

. . . .

30. Neither the respondent-mother nor the respondent[-] father[has] provided any financial support for the children although they have the ability to do so. [They] have no known disabilities.

Based on these findings, the court concluded that respondent-father “willfully abandoned the juveniles for at least six (6) consecutive months immediately preceding the filing of the petition[.]” See N.C. Gen. Stat. § 7B-1111(a)(7). Although the willfulness of a parent’s conduct “is a question of fact to be determined from the evidence[.]” *In re Searle*, 82 N.C. App. at 276, 346 S.E.2d at 514, it is immaterial that the court labeled its finding of willfulness by respondent-father a conclusion of law. See *State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2010) (reviewing a mislabeled “conclusion of law” as a finding of fact).

We conclude that these findings support the trial court’s conclusion that respondent-father willfully abandoned his children under N.C. Gen. Stat. § 7B-1111(a)(7). They show that, during the relevant six-month period, respondent-father “made no effort” to remain in contact with his children or their caretakers and neither provided nor offered anything toward their support. Although respondent-father was jailed and deported to Mexico in September 2010, this Court has repeatedly held that “a respondent’s incarceration, standing alone, neither precludes nor requires a finding of willfulness” under N.C. Gen. Stat. § 7B-1111(a)(7). *In re McLemore*, 139 N.C. App. 426, 431, 533 S.E.2d 508, 510-11 (2000). Similarly, a parent’s deportation should serve as “neither a sword nor a shield in a termination of parental rights decision.” *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (citation and quotation marks omitted), *aff’d per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

Although incarceration and deportation are not exactly the same, we find the cases dealing with incarcerated parents to be instructive. In both situations, a parent has been removed from his home by law enforcement action, presumably against his will. The cases recognize that a parent’s opportunities to care for or associate with a child while incarcerated are different than those of a parent who is not incarcerated. The opportunities of an incarcerated parent are even more limited than those of a deported parent, in that once the deported parent has

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been removed from this country, he would be free to work, send funds to support a child, or communicate with a child by phone, internet, or mail from his own country. His opportunities to see the child personally would be limited, but he would be free to pursue legal action to attempt to have the child returned to his custody in his own country. In any event, respondent-father here failed to take advantage of most of these opportunities after deportation to Mexico.

The evidence showed that respondent-father had the ability to remain in contact with his children while in Mexico but failed to do so. YFS social worker Lynda Peperak testified that she provided respondent-father with her telephone number in February 2010. Respondent-father was arrested on 3 September 2010 and left Mecklenburg County Jail on 14 September 2010. Ms. Peperak spoke with respondent-father by telephone on 6 and 26 May 2011, having “obtained his phone number from one of the foster parents[,]”³ and confirmed that he still had Ms. Peperak’s phone number. Nevertheless, respondent-father did not contact YFS to inquire about his children following his deportation. Ms. Peperak further testified that respondent-father had never “provided any cards, gifts, letters, or anything” for his three children; nor had he ever paid any support for them before or after YFS filed the petitions to terminate his parental rights in May 2011.

YFS social worker assistant Karen Logan-Rudisill, who supervised respondent-mother’s visitation with the children, testified that respondent-father “called during one of the visits . . . to speak with the boys” approximately four or five months prior to the 15 March 2012 termination hearing. He never contacted Ms. Logan-Rudisill regarding the children.

At the hearing held on remand on 18 July 2013, respondent-father testified that he re-entered the United States without documentation in April 2012, and obtained employment and leased an apartment in Charlotte in May 2012. He confirmed that he had been deported in September 2010 and had spoken with respondent-mother and the children “[o]ne time” while in Mexico. Respondent-father claimed he did not contact YFS or the foster parents from Mexico because he “lost the number[.]” He also acknowledged that he had not “provided any monies in support of [the] children since they’ve been in foster care for nearly four years[.]”

3. The record reflects that respondent-father telephoned the children’s foster parents from Mexico on or about 21 March 2011 and gave them his phone number.

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Respondent-father specifically objects to the district court's finding that he "made no efforts to keep updated on the children while they have remained in custody." To the extent the evidence showed that he contacted respondent-mother and spoke to the children on one occasion while he was in Mexico, we agree that finding of fact 52 is not strictly accurate. "However, to obtain relief on appeal, an appellant must not only show error, but that . . . the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996). As set forth above, the evidence showed that a single phone call to respondent-mother represented respondent-father's only effort to contact or keep apprised of his children during the relevant time period.⁴ Therefore, the court's error is harmless. Cf. *In re Estate of Mullins*, 182 N.C. App. 667, 670-71, 643 S.E.2d 599, 601 ("In a non-jury trial, where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions.") (quotation marks and citation omitted), *disc. rev. denied*, 361 N.C. 693, 652 S.E.2d 262 (2007).

This Court has found willful abandonment "where a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance." *In re D.J.D.*, 171 N.C. App. 230, 241, 615 S.E.2d 26, 33 (2005) (citation, quotation marks, and brackets omitted). We have further held that a parent's single attempt to contact a child during a period of incarceration does not preclude a finding of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). *In re McLemore*, 139 N.C. App. at 431, 533 S.E.2d at 511 (citing *In re Harris*, 87 N.C. App. 179, 184, 360 S.E.2d 485, 488 (1987)). Both the evidence and the court's findings reflect that respondent-father's arrest and subsequent deportation did not prevent him from communicating with his children and YFS. In light of respondent-father's single phone call to respondent-mother and his children during the six months immediately preceding 9 May 2011, the district court did not err in finding that he willfully abandoned the children. See *id.*; *In re Searle*, 82 N.C. App. at 276-77, 346 S.E.2d at 514.

4. To the extent that respondent-father claims "close contact" with YFS and the children prior to September 2010, we note this evidence falls outside the six-month period at issue under N.C. Gen. Stat. § 7B-1111(a)(7).

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Having upheld the adjudication under N.C. Gen. Stat. § 7B-1111(a) (7), we need not address the remaining grounds found by the district court for terminating respondent-father's parental rights. *See In re P.L.P.*, 173 N.C. App. at 9, 618 S.E.2d at 246.

IV. Respondent-mother's Appeal

[2] Respondent-mother challenges the court's conclusion that she neglected the minor children under N.C. Gen. Stat. § 7B-1111(a)(1) (2013). A neglected juvenile is one who, *inter alia*, "does not receive proper care, supervision, or discipline . . . ; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2013). In order to support an adjudication under N.C. Gen. Stat. § 7B-1111(a)(1), "[n]eglect must exist at the time of the termination hearing[.]" *In re C.W.*, 182 N.C. App. at 220, 641 S.E.2d at 729. Where "the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future." *Id.* The determination that a child is neglected is a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997).

In support of its conclusion under N.C. Gen. Stat. § 7B-1111(a)(1), the district court found as follows:

7. . . . The primary issues which led to these children being placed in YFS custody were the mother's housing instability, domestic violence between the respondent-mother and [respondent-father]. Lack of appropriate supervision of the children and inappropriate discipline of the children were primary issues as well.

8. [Brandy, Vincent, Ronald, and Adam] were adjudicated neglected and dependent on December 10, 2009

9. . . . Yvonne was adjudicated neglected and dependent on 5 May 2010.

10. . . . The respondent-mother was to engage in mental health treatment, obtain substance abuse assessment, obtain domestic violence assessment, participate in parenting education, visit with the children, maintain contact with YFS social worker, attend the children's appointments, maintain stable housing, and obtain employment in order to provide for the children.

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. . . .

14. The respondent-mother was required to obtain therapy to establish that she could independently care for the children. The mother has suffered significant trauma in her life. The respondent-mother has not been able to complete therapy in more than 22 months that the children have been in YFS custody.

15. The respondent-mother has been inconsistent with her mental health treatment and psychotherapy. The respondent-mother attended psychotherapy sessions with Dr. Alicia Ceballos through September 2010. The respondent-mother did not attend her psychotherapy sessions consistently in October and November 2010. The respondent-mother did not see Dr. Ceballos between November 2010 and March 2011. The respondent-mother has not been consistent in reporting to Dr. Castro for mental health medication and management.

16. The respondent-mother was ordered to complete the NOVA domestic violence program pursuant to this Court's order of 9 June 2010. The mother completed two sessions of NOVA, but was terminated on 10 October 2010 for non-compliance. The YFS social worker obtained the respondent-mother's reinstatement in NOVA on 20 October 2010. The respondent-mother was terminated from NOVA for a second time on 7 December 2010 for non-compliance.

17. The respondent-mother was ordered by the Court on 9 June 2010 to complete [an] adult literacy program. The respondent-mother has not completed [an] adult literacy program.

18. The respondent-mother used corporal punishment with the children when they were in her care.

19. The respondent-mother completed parenting education through family sessions conducted by Traci Withrow; however, the respondent-mother only attended and participated in one shared-parenting visit, although [she] was offered several shared-parenting visits. The respondent-mother was provided with unsupervised visitation in December 2010, but these visits were discontinued after [she] lost the apartment she was living in due to lack of income.

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. . . .

25. The respondent-mother has not attended the children's education and medical appointments although offered by the department.

. . . .

31. [Respondent-mother] has been . . . earning \$300 per weekend per her own testimony for the past five months. [She] has not provided any monies for the support of the children to YFS or to the foster parents.

32. The mother has provided some small amounts of money to the children on occasion during visits. . . . These funds could be considered gifts and are not signs of actively supporting the children financially.

. . . .

46. Nothing has changed [since this Court's opinion in *In re B.S.O.*] other than [respondent-father] has [reentered] the country illegally.

. . . .

49. Upon [respondent-father]'s return to the United States in March 2012, [he] resumed his relationship with [respondent-mother].

50. [Respondent-father] has been providing [respondent-mother] with a stable place to stay since his return to Charlotte. The evidence does not establish that [he] has an emotional attachment to [respondent-mother,] and they are not married.

. . . .

55. The inconsistency of the respondent mother in complying with mental health therapy has not changed.

56. If the children were to return to the home of the respondent mother and [respondent-father], [she] would again be the primary caretaker of the children, and that would not resolve the issue of improper supervision that led to the three oldest children being placed in YFS custody approximately four years ago nor the issues of domestic violence that existed in her relationships.

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57. The probability of the repetition of neglect is high in that the respondent mother has not addressed her mental health issues and [respondent-father] is not willing to change his level of involvement in the daily care of the children.

. . . .

61. [Respondent-father] has provided a stable place to stay for [respondent-mother], but [she] has not addressed her mental health needs through consistent therapy and has not completed NOVA. Her relationship with [respondent-father] is one of convenience and is not stable.

. . . .

66. The juveniles have been in YFS custody for approximately four years and the respondent mother has not addressed the issues that led to the children being placed in YFS custody. . . .

To the extent respondent-mother does not contest these findings on appeal, they are deemed to be supported by competent evidence. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. We address respondent-mother's exceptions to the court's fact-finding below.

Challenging a portion of finding of fact 14, respondent-mother argues that there was no evidence that she was required to obtain mental health therapy "to establish that she could independently care for the children." Respondent-mother notes that no such purpose was explicitly articulated in her family services agreement ("FSA") or F.I.R.S.T.⁵ assessment, or by any of her therapists.

As part of her FSA, respondent-mother agreed to submit to a F.I.R.S.T. assessment and follow its recommendations. The assessment resulted in respondent-mother's referral to CMC-Randolph for a mental health evaluation. Psychotherapist Alicia Ceballos, PhD, evaluated respondent-mother at CMC-Randolph in May 2011. Dr. Ceballos testified that the purpose of the referral was to ensure respondent-mother's compliance "with her medication regimen, and she was to acquire positive coping skills, especially emotion regulation skills in order to relate to her children and her partner."

5. An acronym for Families in Recovery Stay Together.

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Dr. Ceballos found that respondent-mother exhibited traits of borderline personality disorder, including a “very intense fear of abandonment[,]” “all or nothing thinking and functioning out of emotions[,]” “impulsivity relating to the abuse of alcohol, the intense anger and difficulty managing the anger[,] and a pattern of what appeared to be instability in her effective relationships.” Dr. Ceballos developed a treatment plan for respondent-mother which included the goal of “learn[ing] skills in order to relate better with her partner and her children. In particular, improve her regulation of her anger.”

Although respondent-mother’s mental health treatment was not explicitly geared toward raising her children “independently[,]” abundant evidence shows that her mental health issues were inextricably linked to the conditions that led to the children’s removal from her home and their adjudication as neglected and dependent. Respondent-mother’s emotional instability and unregulated anger manifested themselves, *inter alia*, in her use of violence in the home with her children and respondent-father, as well as a series of unstable and volatile romantic relationships both before and after respondent-father’s deportation to Mexico. In adjudicating Yvonne neglected in May 2010, the district court found that “[t]he primary issue” at the time of the four older children’s adjudications “was the mother’s mental health treatment.” The court’s orders have consistently emphasized respondent-mother’s need to follow through with her mental health treatment. As the uncontested findings show—specifically, findings 15, 55, and 61—respondent-mother failed to do so. The ultimate relevance of this programming was necessarily to prepare respondent-mother to properly care for her children. Finding 14 is a reasonable short-hand summary of this evidence.

Respondent-mother next objects to finding 18 that she used corporal punishment with the minor children when they were in her care. While conceding “there is evidentiary support for the finding” as to incidents prior to the children’s removal from her home in 2009, she contends there is no evidence that she used corporal punishment after YFS took custody of the children.

Finding 18 does not purport to refer to corporal punishment by respondent-mother after the children’s removal from her home. The court was free to consider respondent-mother’s conduct toward the children leading to their prior adjudication as neglected. *See In re Ballard*, 311 N.C. 708, 713, 319 S.E.2d 227, 231 (1984) (“[I]n ruling upon a petition for termination of parental rights for neglect, the trial court may consider neglect of the child by its parents which occurred before the entry of a previous order taking custody from them.”) Such evidence

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was relevant in assessing the likelihood of future neglect for purposes of N.C. Gen. Stat. 7B-1111(a)(1), particularly where respondent-mother's use of violence in the home and anger control issues were of central concern.

Respondent-mother claims the evidence does not support findings 25 and 31 that she did not attend her children's medical and educational appointments or "provide[] any monies for the support of the children to YFS or to the foster parents." Although we agree with respondent-mother that these findings vary slightly from the evidence, the discrepancies are inconsequential.

Asked about respondent-mother's attendance at the children's medical and educational appointments, Ms. Peperak testified that respondent-mother "attended one WIC appointment and one pediatrician appointment for the girls" and just one "school, an IEP meeting, for V[incent]" in December 2010. Moreover, respondent-mother "never asked [Ms. Peperak] about [the children's] appointments[.]" When queried about her own attendance, respondent-mother responded, "I remember I went to some of the medical appointments for the boys. I don't remember the exact dates of when that happened." The evidence thus showed that respondent-mother evinced little interest in the children's appointments and for the most part did not attend them.

Regarding respondent-mother's monetary contributions to YFS and the foster parents, Ms. Peperak testified that she had never "provided [YFS] with any money for the children's care[.]" despite reporting that she was earning \$300 to \$400 per week selling food beginning in October 2011. At a permanency planning hearing held on 15 March 2012, respondent-mother confirmed that she had paid nothing toward the support of the children, even though she was then earning at least \$300 per weekend.

Ms. Logan-Rudisill testified that respondent-mother "on occasion" gave \$10 to the girls' foster parents and \$20 to the boys' foster parents. Respondent-mother would also occasionally give the children one-dollar bills. At the hearing held on remand on 18 July 2013, respondent-mother claimed that, within the past year, she had given the children \$600 "once [when] I saw them at McDonald's." On cross-examination, however, respondent-mother explained that she "ran into" the children's foster mother, Ms. H. at a McDonald's in August 2012 and that she then bought "items for the children in August 2012 with Ms. [H.]" In response to the next question posed by counsel, respondent-mother confirmed that she "did not provide any financial support for the children between

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March 2012 and May 2013[.]” We note that the court did find that respondent-mother “has provided some small amounts of money to the children on occasion during visits. . . . These funds could be considered gifts and are not signs of actively supporting the children financially.”

The evidence fully supports the district court’s finding that respondent-mother paid nothing to YFS toward the children’s cost of care.⁶ While the evidence does show her payment of occasional small sums to the foster parents, the corresponding error in finding 32 was harmless. The court’s remaining findings make clear that it did not base the adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) on the absence of such payments from respondent-mother to the foster parents. *See generally In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240 (stating that “erroneous findings unnecessary to the determination do not constitute reversible error”).

Respondent-mother next objects to finding 56, contending that “[t]he evidence does not show that there would be improper supervision of the children if they were returned to the home of the parents.” We find no merit to this claim. The evidence shows that respondent-mother has failed to address her mental health issues and emotional instability. She also failed to complete domestic violence treatment at NOVA and was terminated three times for excessive absences. Although respondent-mother improved her parenting skills by working with child and family psychotherapist Traci Withrow between November 2009 and November 2010, Ms. Logan-Rudisill saw her skills “decline” after respondent-father was deported. Even after respondent-father’s return, respondent-mother maintained a “passive” parenting style and had difficulty managing multiple children. Overall, Ms. Logan-Rudisill saw no improvement in respondent-mother’s “ability to manage the five children” during her involvement in the case.

The evidence and the district court’s findings further reflect the tenuous nature of respondents’ relationship and respondent-mother’s dependence on respondent-father. After respondent-father was deported, respondent-mother resumed her pattern of instability in her relationships and housing. In July 2011, she disclosed to Ms. Logan-Rudisill that she had been involved in a domestic violence incident with her then partner, Kelvin R., and showed Ms. Logan-Rudisill her “scratches and

6. The court found that YFS’s total expenditures for the five children exceeded \$315,000.

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bruises.” Ms. Peperak testified that respondent-mother had at least eleven different residences between December 2010 and March 2012 and “demonstrated a pattern of relationships not only with boyfriends but also with roommates and friends that have been unhealthy and have included violence.” Finally, we note that respondent-mother does not contest the findings that respondent-father has “[re]entered the country illegally” and that “[h]er relationship with [him] is one of convenience and is not stable.” Accordingly, the evidence amply supports the court’s finding 56 that respondent-mother had not resolved the issues of improper supervision and domestic violence that led to the children’s removal from her home.

Respondent-mother also challenges the court’s “ultimate finding” in finding 57 that “[t]he probability of the repetition of neglect is high” in light of her failure to “address[] her mental health issues” and respondent-father’s unwillingness “to change his level of involvement in the daily care of the children.” We believe the evidence and the court’s evidentiary findings are sufficient to show a probability of a repetition of neglect. More than three years after the children’s removal from her home, respondent-mother had yet to confront the primary issues leading to their removal. Moreover, finding 57 is consistent with respondent-father’s testimony “that if the children were to come back home, [respondent-mother] will be dedicated to their care and I would go out to work.”

Where “different inference[s] may be drawn from the evidence, [the trial court] alone determines which inferences to draw and which to reject.” *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985). We conclude that the evidence and the court’s evidentiary findings support a reasonable inference that neglect would likely recur if the children were returned to respondent-mother.

Respondent-mother also challenges the adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) as unsupported by the district court’s findings of fact. However, the court found both a prior adjudication of neglect as to each child and a high probability of a repetition of neglect, as required. *See In re Ballard*, 311 N.C. at 714-15, 319 S.E.2d at 231-32. Therefore, this assignment of error is overruled.

Having affirmed the adjudication of grounds to terminate respondent-mother’s parental rights for neglect, we do not address the remaining grounds found by the district court. *See In re P.L.P.*, 173 N.C. App. at 9, 618 S.E.2d at 246.

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[234 N.C. App. 722 (2014)]

V. Conclusion

The petitions filed by YFS provided sufficient notice to respondent-father to allow an adjudication of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). The evidence and the district court's findings support an adjudication of grounds to terminate respondent-father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(7), and of grounds to terminate respondent-mother's parental rights for neglect under N.C. Gen. Stat. § 7B-1111(a)(1). Therefore, we affirm the order terminating respondents' parental rights.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

IN THE MATTER OF N.T.U., MINOR CHILD

No. COA14-89

Filed 1 July 2014

1. Termination of Parental Rights—subject matter jurisdiction—temporary emergency jurisdiction—home state

The trial court had subject matter jurisdiction to terminate respondent mother's parental rights. The trial court properly entered the initial nonsecure custody orders pursuant to its temporary emergency jurisdiction based on the particular circumstances. North Carolina became the minor child's home state such that the trial court possessed jurisdiction to terminate respondent's parental rights pursuant to N.C.G.S. § 50A-201(a).

2. Termination of Parental Rights—grounds—incapable of providing care and supervision—incarceration—failure to provide viable alternative

The trial court did not err by terminating respondent's parental rights based on N.C.G.S. § 7B-1111(a)(6). Respondent was incapable of providing for the care and supervision of the minor child based on her incarceration, this incapacity would continue for the foreseeable future, and respondent failed to provide any viable alternative child care arrangements.

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[234 N.C. App. 722 (2014)]

Appeal by respondent from judgment entered 25 September 2013 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 11 June 2014.

Hanna Frost Honeycutt for petitioner-appellee Buncombe County Department of Social Services.

Amanda Armstrong for guardian ad litem.

Jeffrey L. Miller for respondent-appellant.

DAVIS, Judge.

N.U. (“Respondent”) appeals from the trial court’s termination of her parental rights as to her son N.T.U. (“Nathan”).¹ On appeal, Respondent argues that (1) the trial court lacked subject matter jurisdiction to terminate her parental rights as to Nathan; and (2) there was insufficient evidence to support either of the trial court’s bases for terminating her parental rights. After careful review, we affirm.

Factual Background

Nathan was born to Respondent and Z.R.² in September of 2010 in Greenville, South Carolina. Nathan lived in South Carolina with Respondent until 21 September 2011.

On 21 September 2011, the Buncombe County Department of Social Services (“DSS”) received a Child Protective Services report alleging that officers of the Asheville Police Department had arrested Respondent in connection with a bank robbery and homicide that had occurred in South Carolina earlier that day. Respondent was apprehended by law enforcement officers at a motel in Asheville. Nathan, who was one year old at the time, was with Respondent at the motel. Respondent was taken to the Buncombe County Jail.

The following day, DSS filed a juvenile petition alleging that Nathan was a neglected and dependent juvenile and obtained nonsecure custody of Nathan that same day. On 27 September 2011, a seven-day hearing was held on the nonsecure custody order. Following the hearing, the

1. The pseudonym “Nathan” is used throughout this opinion to protect the privacy of the minor child and for ease of reading. N.C.R. App. P. 3.1(b).

2. Nathan’s father, Z.R., did not appeal from the trial court’s order terminating his parental rights and, therefore, is not a party to this appeal.

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trial court entered an order on 14 October 2011 continuing nonsecure custody with DSS. In its 14 October 2011 order and in a subsequent order entered 29 November 2011 continuing nonsecure custody with DSS, the trial court acknowledged that South Carolina was Nathan's home state but that the Buncombe County District Court had "temporary emergency jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act" ("UCCJEA").

On 1 December 2011, the trial court held an adjudication hearing and, with the consent of Respondent, adjudicated Nathan to be a neglected and dependent juvenile. In its order, the trial court once again found that although South Carolina was Nathan's home state, the trial court had temporary emergency jurisdiction under the UCCJEA. The trial court ordered that Nathan remain in the custody of DSS.

The trial court conducted permanency planning review hearings during the course of the next year. By order entered 16 October 2012, the court set a permanent plan of guardianship with a concurrent plan of adoption for Nathan. On 12 April 2013, DSS filed a petition to terminate Respondent's parental rights as to Nathan. The termination of parental rights hearing was held on 24 July and 14 August 2013, and on 25 September 2013, the trial court entered an order terminating Respondent's parental rights on the grounds of neglect and incapacity to provide proper care and supervision. Respondent filed a timely notice of appeal.

Analysis

I. Subject Matter Jurisdiction

[1] Respondent first contends the Buncombe County District Court lacked subject matter jurisdiction to terminate her parental rights. We disagree.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). The issue of subject matter jurisdiction may be raised for the first time on appeal. *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). Whether a court possesses jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

"In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). The jurisdictional statute governing actions

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to terminate parental rights is N.C. Gen. Stat. § 7B-1101, which provides as follows:

The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. *The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a non-resident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106. . . .*

N.C. Gen. Stat. § 7B-1101 (2013) (emphasis added).

The above-referenced statutes listed in N.C. Gen. Stat. § 7B-1101 are all provisions of the UCCJEA, which defines a “child-custody determination” as “a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child.” N.C. Gen. Stat. § 50A-102(3) (2013). The jurisdictional requirements of the UCCJEA apply to proceedings for the termination of parental rights. *In re N.R.M.*, 165 N.C. App. 294, 298, 598 S.E.2d 147, 149 (2004). Pursuant to N.C. Gen. Stat. § 7B-1101, the trial court must have jurisdiction to make a child-custody determination under the provisions of N.C. Gen. Stat. § 50A-201 or N.C. Gen. Stat. § 50A-203 in order to terminate the parental rights of a nonresident parent. *See* N.C. Gen. Stat. § 7B-1101; *K.U.-S.G.*, 208 N.C. App. at 132, 702 S.E.2d at 106.

N.C. Gen. Stat. § 50A-203 pertains only to the modification of a custody order previously entered by another state. In the present case, no other state has ever entered a custody order as to Nathan and, therefore, N.C. Gen. Stat. § 50A-203 does not apply here. Accordingly, we

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must determine whether the trial court had jurisdiction to terminate Respondent's rights pursuant to N.C. Gen. Stat. § 50A-201.

N.C. Gen. Stat. § 50A-201 provides:

(a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

- a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
- b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

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N.C. Gen. Stat. § 50A-201 (2013).

Respondent contends that the trial court could not have properly exercised jurisdiction to terminate her parental rights pursuant to N.C. Gen. Stat. § 50A-201 because it never actually possessed *any* jurisdiction over the custody of Nathan. We disagree.

The trial court noted that it was exercising temporary emergency jurisdiction over Nathan pursuant to N.C. Gen. Stat. § 50A-204(a) when it first entered the initial nonsecure custody orders. N.C. Gen. Stat. § 50A-204 allows a North Carolina court to exercise temporary emergency jurisdiction “if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse.” N.C. Gen. Stat. § 50A-204(a) (2013).

Respondent argues that the trial court acted without proper temporary emergency jurisdiction because it failed to make findings that Nathan was abandoned or that it was necessary to exercise jurisdiction to protect Nathan from mistreatment or abuse. However, we have previously held that the statutory bases for jurisdiction set forth in the UCCJEA do *not* require a trial court to make specific findings of fact regarding jurisdiction and that N.C. Gen. Stat. § 50A-204 “states only that certain circumstances must exist, not that the court [must] specifically make findings to that effect” *In re E.X.J.*, 191 N.C. App. 34, 40, 662 S.E.2d 24, 27-28 (2008) (citation and quotation marks omitted), *aff’d per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009).

As such, we conclude that the trial court properly entered the initial nonsecure custody orders pursuant to its temporary emergency jurisdiction because the particular circumstances in this case supported emergency jurisdiction. When the trial court entered its 14 October 2011 order continuing nonsecure custody with DSS, Nathan was present in the State and — due to his mother’s arrest and subsequent incarceration — left without supervision or any provision for his care. *See* N.C. Gen. Stat. § 50A-102(1) (defining “abandoned” as “left without provision for reasonable and necessary care or supervision”). Indeed, the juvenile petition alleged, and the trial court found, that DSS needed to assume custody of Nathan at that time because Respondent would be unable to provide care for him and the individual she recommended as a kinship placement had pending criminal charges, including sexual offenses against a child. Thus, we believe the trial court correctly treated Nathan as having been abandoned and that its initial assertion of jurisdiction was proper under N.C. Gen. Stat. § 50A-204.

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Therefore, having determined that the trial court properly exercised temporary emergency jurisdiction over the custody of Nathan initially, the sole remaining question is whether the trial court had jurisdiction under N.C. Gen. Stat. § 50A-201 at the time it terminated Respondent's parental rights. Neither before nor after the trial court's entry of the nonsecure custody orders have there been any custody proceedings instituted, or custody orders entered, in any state other than North Carolina. Nathan has lived in North Carolina with his foster parents since September 2011. Therefore, guided by our decision in *E.X.J.*, 191 N.C. App. 34, 662 S.E.2d 24, we conclude that North Carolina became Nathan's home state such that the trial court possessed jurisdiction to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 50A-201(a).

In *E.X.J.*, we held that the trial court properly exercised temporary emergency jurisdiction over the juveniles at issue in that case in initially placing them with the Rutherford County Department of Social Services ("the Department") because the respondent-mother had traveled from Alabama to North Carolina with the children and then left them with the Department because she felt she was unable to care for them. *Id.* at 39-40, 662 S.E.2d at 27. After the Department obtained custody, the children remained in North Carolina with a parent (or a person acting as a parent) for at least six months before the Department filed the petition to terminate parental rights and no custody orders were entered in any other state during that time. *Id.* at 43, 662 S.E.2d at 29. Consequently, this Court concluded that North Carolina had become the juveniles' home state for purposes of N.C. Gen. Stat. § 50A-201 and that jurisdiction therefore existed to terminate parental rights. *Id.*; see N.C. Gen. Stat. § 50A-102(7) (defining "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding").

The same is true in the present case. Nathan has resided in North Carolina with persons acting as parents (his foster parents) since September 2011. No custody proceedings have been instituted or custody orders entered in another state during this time — or, indeed, at *any* time. Accordingly, when DSS filed the petition seeking termination of Respondent's parental rights on 12 April 2013, North Carolina had become Nathan's home state and the trial court had jurisdiction under N.C. Gen. Stat. § 50-201(a) to enter its order terminating Respondent's parental rights.

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II. Grounds for Termination of Parental Rights

[2] Having determined that the trial court had subject matter jurisdiction to adjudicate the issue of whether Respondent's parental rights should be terminated, we now turn to the question of whether the trial court properly terminated those rights. In order to terminate a parent's parental rights, a trial court must find — based on clear, cogent, and convincing evidence — that one or more of the statutory grounds for termination exist. N.C. Gen. Stat. § 7B-1111(a) (2013); *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). We review a court's order terminating parental rights to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (2004). We review the trial court's conclusions of law *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

Here, the trial court made the following pertinent findings of fact:

16. On September 21, 2013 [sic], the Buncombe County Department of Social Services (“Department”) received a Child Protective Services report alleging that respondent mother was being arrested for serious criminal charges, that the minor child was with her, that her proposed kinship placement was inappropriate and that the minor child would not have a caretaker after the respondent mother's arrest.

17. SW Jennie Wells initiated the investigation. SW Jennie Wells went to the Sleep Inn Hotel in Asheville, North Carolina. SW Wells found respondent mother, her friend, her brother and the minor child to be present along with law enforcement officers.

18. Respondent mother had diapers and some clothes for the minor child.

19. Respondent mother admitted that she was present when her brother shot and killed a man named Sean. The minor child was with a relative during the time Sean was killed by respondent mother's brother.

20. After the killing, respondent mother separated from her brother and reunited with the minor child.

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21. Respondent mother received a text message from her brother telling her to “lay low.”

22. Respondent mother later rejoined her brother, along with her friend and the minor child, and left town. Respondent mother, her brother, friend and the minor child traveled in the same car and stayed at various hotels in an attempt to evade law enforcement.

23. While on the run from law enforcement, respondent mother’s brother robbed a bank and respondent mother, her friend and the minor child waited in the car while the robbery occurred.

24. Respondent mother did not contact law enforcement at any point in time to report the killing or bank robbery.

25. Respondent mother knew she would be arrested.

26. Respondent mother advised that a relative named [T.D.] was on his way to pick up the child. [T.D.] had charges pending for indecent liberties and lewd act on a child. [T.D.] was respondent mother’s first choice for placement of the minor child. Placement with [T.D.] was not approved by the Department for placement [sic] due to his criminal history.

27. Respondent mother did not provide any other options for placement of the minor child.

28. Respondent mother was arrested for murder and robbery charges and was taken to jail. Respondent mother’s brother and friend were also arrested.

29. The Department sought and obtained non-secure custody of the minor child and the non-secure custody order was entered on September 22, 2011. The minor child has remained in the continuous custody of the Department since that time.

30. Although respondent mother was initially jailed at the Buncombe County Jail for a period of time, respondent mother was ultimately housed at the Pickens County Jail in South Carolina.

31. In October of 2011, SW Sumner mailed respondent mother a copy of her case plan, which required respondent

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mother to provide viable options for kinship placement and to abide by certain conditions for visitation if she was released from jail.

32. On November 14, 2011, SW Sumner met with respondent mother in the Pickens County Jail. The respondent mother reported that she had received letters from the social worker, copies of the case plan and the visitation plan. SW Sumner provided respondent mother with an update on the minor child, reviewed the case plan with respondent mother and reviewed the visitation plan with respondent mother. At that meeting, respondent mother did not provide any prospective kinship providers.

33. In December of 2011, the minor child was adjudicated a neglected and dependent child, as defined by N.C.G.S. §§ 7B-101(15) and (9).

34. In July of 2012, respondent mother's attorney provided the names of prospective placements for the minor child, [M.U.] and [T.U.]. Later, SW Sumner was informed that family friend, [J.M.], may also be an option for placement.

35. A request for a home study on [M.U.] was sent to South Carolina through ICPC. The home study was approved by South Carolina. However, subsequent to the approval of his home study, [M.U.] was arrested and incarcerated. Additionally, Child Protective Services became involved with his family. The Court in the underlying juvenile action did not approve [M.U.] for placement of the minor child.

36. A request for a home study on [T.U.] was sent to South Carolina through ICPC. The home study was approved by South Carolina. After the home study of [T.U.] was approved, the Department had a difficult time getting [T.U.] to visit with the minor child so that she could establish a relationship with him. [T.U.] demonstrated that she was not interested in placement with the minor child as she failed to avail herself of opportunities to visit with the minor child even though the Department offered to go to South Carolina so she could visit. [T.U.] physically disciplined a cousin in front of the social worker in a visitation room at DSS. The Court in the underlying juvenile action did not approve [T.U.] for placement of the minor child.

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37. A home study was completed on family friend, [J.M.]. The home study was not approved as [J.M.] was convicted of a crime related to crack cocaine, had insufficient housing, along with other reasons. [J.M.] failed to pursue placement of the minor child after SW Sumner's visit. The Court in the underlying juvenile action did not approve [J.M.'s] home for placement of the minor child.

38. Respondent mother has not provided any other possible kinship placement options for the minor child.

39. In September of 2012, respondent mother began writing the minor child. She has sent more than ten letters to the child and/or foster parents.

40. The minor child is not old enough to read the letters from respondent mother.

41. Respondent mother's date of release from incarceration is unknown.

42. Respondent mother's trial dates for robbery and murder are unknown.

43. The minor child was taken into custody when he was one year old and he is now almost three years old.

44. The minor child has spent almost 2/3 of his life outside of the care of respondent mother.

45. The actions of respondent mother invited state intervention.

46. Respondent mother has not completed any services to improve the conditions which caused the minor child to be removed from her care.

47. There is no evidence that respondent mother understands the gravity of her past conduct and how her past conduct placed the minor child at risk of harm.

48. Respondent mother's incarceration has rendered her unable and unavailable to parent the juvenile.

The trial court ultimately found as fact and concluded as a matter of law that:

57. Pursuant to N.C.G.S. § 7B-1111(a)(1), the respondent mother has neglected the minor child, as specified above.

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There is a high likelihood of a repetition of the neglect if the minor child was returned to the care and control of the respondent mother as the respondent mother has failed to correct those conditions that led to the removal of the minor child from her care and has failed to show any understanding of the gravity of her past conduct or the danger she placed the minor child in due to her past conduct, including running from law enforcement with her brother and the minor child after witnessing her brother kill a man and waiting in the car with the minor child while her brother committed a bank robbery. The respondent mother has not completed any services.

58. Pursuant to N.C.G.S. 7B-1111(a)(6), the respondent mother is incapable of providing for the proper care and supervision of the minor child, such that the minor child is a dependent child within the meaning of G.S. 7B-101, and there is a reasonable probability that such incapacity will continue for the foreseeable future. The respondent mother's incapability is the result of incarceration. The respondent mother has no appropriate, alternative child care arrangements for the juvenile.

Respondent challenges all or portions of findings 27, 32, 34-37, 46-47, and 57-58 as unsupported by the evidence. She also contends that these findings were insufficient to support the trial court's conclusion that grounds existed to terminate her parental rights.

In termination of parental rights proceedings, the trial court's "finding of any one of the . . . enumerated grounds is sufficient to support a termination." *In re J.M.W.*, 179 N.C. App. 788, 791, 635 S.E.2d 916, 918-19 (2006) (citation and quotation marks omitted). Thus, on appeal, if we determine that any one of the statutory grounds enumerated in § 7B-1111(a) is supported by findings of fact based on competent evidence, we need not address the remaining grounds. *In re D.H.H.*, 208 N.C. App. 549, 552, 703 S.E.2d 803, 805-06 (2010).

It is well settled that findings of fact made by the trial court in a termination of parental rights proceeding are binding "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110 11, 316 S.E.2d 246, 252-53 (1984). Findings of fact are also binding if they are not challenged on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Moreover, if such findings sufficiently support

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one ground for termination, this Court need not address a respondent's challenges to findings of fact that support alternate grounds for termination. See *In re J.L.H.*, ___ N.C. App. ___, ___, n. 3, 741 S.E.2d 333, 335, n. 3 (2012) (noting that although respondent challenged additional findings of fact, this Court was not required to address those arguments because "they [were] not relevant" to the particular ground that supported the trial court's termination of parental rights).

In the present case, the trial court concluded that Respondent's parental rights were subject to termination under N.C. Gen. Stat. § 7B-1111(a)(6), which permits the termination of rights if

the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6).

Specifically, the trial court concluded that (1) Respondent was incapable of providing care for Nathan because of her incarceration; and (2) Respondent had "no appropriate, alternative child care arrangements for [Nathan]." We believe that the evidence presented at the hearing and the findings of fact based on that evidence support the trial court's conclusion that Respondent is incapable of providing for the care and supervision of Nathan, that this incapacity will continue for the foreseeable future, and that Respondent failed to provide any viable alternative child care arrangements.

The unchallenged findings show that Respondent has been continuously incarcerated since September 2011 awaiting trial on charges stemming from two separate incidents — a homicide and a bank robbery. During that time and due to her incarceration, Respondent has been personally incapable of providing proper care and supervision of her child, and nothing in the record indicates that she will be released from incarceration in the foreseeable future. Respondent argues that her inability to care for Nathan during her incarceration is an insufficient basis for termination of her parental rights because (1) the trial court did not

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make a specific finding as to the expected duration of her incarceration; and (2) Respondent's incarceration could, in theory, end at any time. We are not persuaded.

We note that “[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (citation and quotation marks omitted), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). As such, while a parent's imprisonment is relevant to the trial court's determination of whether a statutory ground for termination exists, it is not determinative. *See id.*

Termination of parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(6) does not require that the parent's incapability be permanent or that its duration be precisely known. Instead, this ground for termination merely requires that “there is a *reasonable probability* that such incapability will continue for the foreseeable future.” N.C. Gen. Stat. § 7B-1111(a)(6) (emphasis added). Given that (1) Respondent has been held on charges relating to homicide and bank robbery since September 2011 and has not yet received a trial date; and (2) no evidence was presented giving rise to any expectation of her release from incarceration in the foreseeable future, we cannot conclude that the trial court erred in determining that there is a reasonable probability that Respondent's incapability would continue for the foreseeable future.

Respondent next challenges the trial court's determination that she lacked appropriate alternative child care arrangements for Nathan. The record indicates that Respondent provided DSS with three possible placements for Nathan: her sister, T.U.; her brother, M.U.; and her friend, J.M. DSS had concerns regarding placing Nathan with T.U. after witnessing T.U. physically discipline another child in the DSS visitation room. While a home study was approved for T.U. and T.U. sought placement of Nathan with her, she was not ultimately approved for placement by the trial court based — at least in part — on the ground that she “demonstrated that she was not interested” in Nathan's placement with her by declining opportunities to get to know Nathan through visitation. M.U. was initially approved for placement, but the trial court ultimately determined that he was not an appropriate alternative caregiver because he was incarcerated following his approval by DSS, requiring the Child Protective Services division in South Carolina to become involved with his own children. Finally, Respondent's friend, J.M., was not approved for placement because of a prior crack cocaine conviction and DSS's concerns regarding her housing. As such, Respondent's three proposed caretakers for Nathan were deemed unsuitable, supporting the trial

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court's determination that Respondent lacked appropriate alternative child care arrangements.

Accordingly, we affirm the trial court's order terminating Respondent's parental rights. Because we conclude that the trial court did not err in terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), it is unnecessary to address her arguments regarding neglect — the other ground for termination found by the trial court. *P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246 (“[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds.” (citation and internal quotation marks omitted)).

Conclusion

For the reasons stated above, we affirm the trial court's order terminating Respondent's parental rights.

AFFIRMED.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA

v.

ANTHONY DUWANE COTTRELL, DEFENDANT

No. COA13-721

Filed 1 July 2014

Search and Seizure—traffic stop—no reasonable articulable suspicion

The Court of Appeals granted defendant's motion for writ of certiorari and determined that the trial court erred in a drugs case by denying defendant's motion to suppress evidence obtained after a traffic stop since defendant's consent to the search of his vehicle was given during an unlawful seizure. The officer continued to detain defendant after completing the original purpose of the stop without having reasonable articulable suspicion of criminal activity in violation of the Fourth Amendment.

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Appeal by defendant from judgment entered 11 February 2013 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 21 November 2013.

Attorney General Roy Cooper, by Associate Attorney General Gayle Kemp and Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

GEER, Judge.

Defendant Anthony Duwane Cottrell pled guilty to possession of a firearm by a felon, possession of a schedule II controlled substance, and possession of up to one-half ounce of marijuana. He also admitted being a habitual felon. On appeal, he contends that the trial court erred in denying his motion to suppress. He argues that he was unconstitutionally seized when the investigating officer extended a traffic stop after addressing its original purpose without (1) a reasonable and articulable suspicion of criminal activity or (2) defendant's consent to being further detained. We agree with defendant and hold that, under *State v. Myles*, 188 N.C. App. 42, 654 S.E.2d 752, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008), because the officer continued to detain defendant after completing the original purpose of the stop without having reasonable, articulable suspicion of criminal activity, defendant was subjected to a seizure in violation of the Fourth Amendment. Since defendant's consent to the search of his vehicle, given during the unlawful seizure, was necessarily invalid, the trial court should have granted defendant's motion to suppress.

Facts

At 11:37 p.m. on 28 May 2012, Officer Jordan Payne of the Winston-Salem Police Department observed defendant driving a Dodge Intrepid with the car's headlights off. Officer Payne initiated a traffic stop, and defendant pulled into a nearby parking lot. The dashboard video camera on Officer Payne's patrol car recorded the subsequent stop.

Officer Payne approached defendant's car and asked defendant, who was the car's sole occupant, for his license and registration. The officer told defendant that if everything checked out, defendant would soon be cleared to go. Defendant did not smell of alcohol, he did not

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have glassy eyes, he was not sweating or fidgeting, and he made no contradictory statements to Officer Payne.

Officer Payne then returned to his patrol car, ran defendant's identification, and learned that defendant's license and registration were valid. Officer Payne also checked defendant's criminal history and learned that defendant had a history of "drug charges and various felonies." Officer Payne returned to defendant's car and asked defendant to keep his music down since the officer had heard loud music coming from either defendant's car or the car in front of defendant's car as they drove down the street.

While Officer Payne spoke to defendant, he smelled an extremely strong odor coming from defendant's car that the officer described as "like a fragrance, cologne-ish," but "more like an incense than what someone would wear." Officer Payne believed the odor was a "cover scent" – a fragrance released in a vehicle to cover the smell of drugs like marijuana. Officer Payne asked defendant about the odor, and defendant showed him a small, clear glass bottle with some liquid in it and a roll-on dispenser. Defendant stated it was an oil he put on his body. Officer Payne told defendant that fragrances were typically used to mask the odor of marijuana, but defendant claimed he was not trying to hide any odors.

Officer Payne, who still had possession of defendant's license and registration, then asked for consent to search defendant's car. When defendant refused to give consent, Officer Payne said defendant was not being honest with him and indicated he could call for a drug-detection dog to sniff defendant's car. Defendant replied that he did not want the officer to call for a dog and that he just wanted to go home. When Officer Payne insisted he was going to call for the dog, defendant then consented to a search of the car.

Officer Payne had defendant step out of the car and frisked defendant for weapons, finding none. Officer Payne began searching defendant's car at 11:41 p.m., roughly four minutes after he first observed defendant's car driving down the street. He looked first in the driver's side and then went around to the passenger's side. He removed the key from the ignition and unlocked the glove box with it. When the officer opened the glove box, a handgun and a baggy containing a white powdery substance, later determined to be cocaine, fell out. Officer Payne then placed defendant under arrest. After defendant was arrested, he admitted to

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Officer Payne that he had a small baggie of marijuana in his sock. The officer never returned defendant's license and registration to defendant.

Defendant was indicted for possession of a firearm by a felon, possession of a schedule II controlled substance, possession of up to one-half ounce of marijuana, and being a habitual felon. Defendant filed a motion to suppress on 30 January 2013 and an amended motion to suppress on or about 4 February 2013.

At a 5 February 2013 hearing on the motion to suppress, the State presented the testimony of Officer Payne and the video and audio recording of the stop taken by the patrol car's dashboard camera. Defendant testified in support of his motion. After the trial court denied the motion to suppress, defendant pled guilty to the charges and admitted being a habitual felon. The trial court consolidated the charges into a single judgment and sentenced defendant to a mitigated-range term of 76 to 104 months imprisonment. After entry of the judgment, defendant gave oral notice of appeal from the denial of his motion to suppress and filed written notice of appeal.

I

We must initially address this Court's jurisdiction over this appeal. "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2013). Our Supreme Court has held that "when a defendant intends to appeal from the denial of a suppression motion pursuant to this section, he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute." *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990). Further, since "[a] Notice of Appeal is distinct from giving notice of *intent* to appeal" the denial of a motion to suppress, a defendant who has properly preserved his right to appeal the denial of a suppression motion must also properly appeal the subsequent judgment pursuant to Rule 4 of the Rules of Appellate Procedure. *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 405 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996).

In other words, in order to properly appeal the denial of a motion to suppress after a guilty plea, a defendant must take two steps: (1) he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order, and (2) he must timely and properly appeal from the final

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judgment. In this case, defendant concedes that he did not properly give the required notice of his intent to appeal the denial of his motion to suppress.¹

Defendant has, however, filed a petition for writ of certiorari with this Court to which he has attached affidavits from his trial counsel and the prosecutor, both of which indicate that defense counsel gave the prosecutor verbal notice that if the motion to suppress was denied, defendant would enter a plea of guilty and appeal the denial of the motion to suppress. In addition, during the plea colloquy, defense counsel generally advised the trial court of defendant's intent to appeal without referencing the motion to suppress.

The State has filed a motion to dismiss defendant's appeal, asserting that there is no dispute that defendant waived his right to appeal by failing to properly give notice of his intent to appeal the denial of his suppression motion. Based on defendant's concession, we grant that motion and dismiss defendant's appeal. *See McBride*, 120 N.C. App. at 625, 626, 463 S.E.2d at 405 (dismissing appeal from denial of suppression motion followed by guilty plea for failure to properly give State and trial court notice of intent to appeal denial of suppression motion). Nevertheless, because it is apparent that the State was aware of defendant's intent to appeal the denial of the motion to suppress prior to the entry of defendant's guilty pleas and because defendant has lost his appeal through no fault of his own, we exercise our discretion to grant the petition for writ of certiorari and address the merits of defendant's appeal. *See State v. Atwell*, 62 N.C. App. 643, 645, 303 S.E.2d 402, 404 (1983) (dismissing appeal but issuing writ of certiorari to reach merits of defendant's appeal from denial of suppression motion since, although record did not demonstrate proper notice of intent to appeal, "[t]here [was] at least some evidence that the district attorney's office and the Court had notice of a possible appeal of the denial of the suppression motion before the guilty plea").

II

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Defendant contends that, while the

1. We note that the record does contain some notice of defendant's intent to appeal prior to entry of the guilty plea, but since defendant has not argued that the notice given was adequate, we do not address that issue. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

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traffic stop was valid, Officer Payne violated the Fourth Amendment when he detained defendant further after determining that defendant's license and registration were valid and defendant had no outstanding warrants. Defendant argues that Officer Payne had no reasonable, articulable suspicion of criminal activity sufficient to justify detaining defendant once the purpose of the traffic stop was completed.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Defendant does not challenge any of the trial court's findings of fact and they are, therefore, binding on this Court. *See State v. Robinson*, 187 N.C. App. 795, 797, 653 S.E.2d 889, 891 (2007) (explaining that unchallenged findings of fact are "conclusive and binding on appeal"). Defendant, however, challenges the following conclusions of law made by the trial court:

3. Generally, an initial stop concludes after the officer returns the detainee's license and registration. *State v. Jackson*, 199 N.C. App. 236[, 681 S.E.2d 492] (2009) [;] *State v. Kincaid*, 147 N.C. App. 94[, 555 S.E.2d 294] (2001). In this case, because the initial seizure had not concluded (no return of Defendant Cottrell's license), a [*State v.*] *McClendon*[, 350 N.C. 630, 517 S.E.2d 128 (1999)] analysis about developing reasonable, articulable suspicion that criminal activity is afoot is inapplicable. . . .

. . . .

5. Officer Payne was going to call for a dog to sniff Defendant Cottrell's car. This was permissible, so long as dog [sic] would get there in under five minutes. However, Defendant then consented to search.
6. Defendant's consent was not coerced. Officer Payne was not threatening something (a dog sniff) he didn't have the right to do. The threat to do what an officer has a legal right to do does not constitute duress. It is

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not duress to take any measure authorized by law and the circumstances of the case. . . .

This Court has held that, “[g]enerally, the scope of the detention must be carefully tailored to its underlying justification. Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay.” *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 754 (quoting *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998)). We must, therefore, first address whether the initial purpose of the stop was completed prior to the time defendant gave consent to search.

In *Myles*, the officer conducted a traffic stop for weaving, indicating possible impaired driving. *Id.*, 654 S.E.2d at 755. The car stopped by the officer was rented by the defendant passenger. *Id.* at 43, 654 S.E.2d at 753. During the stop, the officer detected no odor of alcohol and described the driver and the defendant as cooperative. *Id.* at 45, 654 S.E.2d at 755. The officer did not find any weapons or contraband on the driver when he frisked him, and the driver had a valid driver’s license. *Id.* The officer issued a warning ticket. *Id.* at 43, 654 S.E.2d at 753. The officer then proceeded to question the defendant, separately from the driver, about his travel plans and the rental car agreement. *Id.*, 654 S.E.2d at 754.

On appeal, this Court in *Myles* observed that since there was no evidence to indicate that either the driver or the defendant was impaired, the officer “considered the traffic stop ‘completed’ because he had ‘completed all [his] enforcement action of the traffic stop.’” *Id.* at 45, 654 S.E.2d at 755. The Court, therefore, held that “in order to justify [the officer’s] further detention of defendant, [the officer] must have had defendant’s consent or ‘grounds which provide a reasonable and articulable suspicion in order to justify further delay’ before he questioned defendant.” *Id.* (quoting *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360).

Here, the trial court has misapplied this Court’s decisions in *Jackson* and *Kincaid*. In each of those cases, this Court held that once an officer returned the defendant’s license and registration, the seizure had ended because the defendant was free to go, and any further communications between the officer and the defendant were, as a result, consensual. See *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497 (“Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee’s driver’s license and registration.”); *Kincaid*, 147 N.C. App. at 100, 555 S.E.2d at 299 (“A reasonable person, under the circumstances, would have felt free to leave when [his license

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and registration] were returned. Therefore, the first seizure concluded when [the officer] returned the documents to defendant.”).

While *Jackson* and *Kincaid* hold that return of a person’s license and registration may mean that the traffic stop has concluded, nothing in *Jackson* and *Kincaid* suggests that the officer may prolong a traffic stop, after the original purpose of the stop has been completed, simply by not returning the driver’s documentation. Indeed, *Jackson* sets out the applicable rule overlooked by the trial court: “Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual.” *Jackson*, 199 N.C. App. at 241-42, 681 S.E.2d at 496.

The trial court erred, therefore, in basing its decision on the premise that because the officer had not yet returned defendant’s license, the underlying purpose of the stop was not yet complete, and the officer could continue to detain defendant. *See also State v. Jarrett*, 203 N.C. App. 675, 676, 682-83, 692 S.E.2d 420, 422, 426 (2010) (holding initial purpose for stop at checkpoint “was addressed when defendant produced a valid North Carolina driver’s license and registration” even though that occurred “[b]efore [the officer] return[ed] defendant’s documentation”).

Turning to the question of when Officer Payne completed the purpose of the underlying stop in this case, the trial court found that Officer Payne had observed defendant driving without headlights and that the officer, during the stop, had told defendant to keep his music down because “he had heard loud music from either Defendant’s car or the one in front of Defendant as they drove down Trade Street, and that this would violate a local noise ordinance.” For the purposes of our analysis, we assume that Officer Payne stopped defendant for both the headlights infraction and the potential noise violation.

With respect to the two reasons given for the officer’s stop, the trial court found that defendant had turned his headlights on before he actually stopped and that defendant told the officer he realized his headlights had not been on and apologized for having them off. The trial court found that upon taking defendant’s license and registration, Officer Payne told defendant that “if everything checked out, he would be [sic] soon be cleared to go.” Officer Payne then determined that defendant’s license and registration were valid and defendant had no outstanding warrants. When the officer returned to defendant’s car, the officer asked defendant to make sure to keep his music down because of the noise ordinance. The officer then smelled a strong fragrance, and all of the

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officer's questions and statements after that point had to do with the fragrance, whether defendant had drugs in the car, whether defendant would consent to a search, and whether the officer was going to call for a drug-sniffing dog.

Given the facts found by the trial court, we hold that once Officer Payne told defendant to keep his music down, the officer had completely addressed the original purpose for the stop. Defendant had turned on his headlights, he had been warned about his music, his license and registration were valid, and he had no outstanding warrants. Consequently, Officer Payne was then required to have "defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' *before*" asking defendant additional questions. *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 755 (quoting *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360).

The trial court erred in concluding otherwise. *See also Jackson*, 199 N.C. App. at 242, 681 S.E.2d at 496-97 (holding stop was unlawfully extended beyond original purpose of determining whether driver had valid driver's license when, after officer had dispelled suspicion of invalid license, she asked driver whether there was anything illegal in vehicle).

Turning next to whether Officer Payne had a reasonable and articulable suspicion of criminal activity in order to extend the stop beyond its original scope, our Supreme Court has explained:

Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court requires that [t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, [a] court must consider the totality of the circumstances – the whole picture in determining whether a reasonable suspicion exists.

State v. Styles, 362 N.C. 412, 414, 665 S.E.2d 438, 439-40 (2008) (internal citations and quotation marks omitted). In addition, "[t]he requisite degree of suspicion must be high enough 'to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.'" *State*

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v. Fields, 195 N.C. App. 740, 744, 673 S.E.2d 765, 767 (2009) (quoting *State v. Murray*, 192 N.C. App. 684, 687, 666 S.E.2d 205, 208 (2008)).

Here, the trial court found that as of the time Officer Payne told defendant about the noise ordinance, the officer knew that defendant's license and registration were valid, defendant had no outstanding warrants, defendant had turned his headlights back on prior to being stopped and had apologized, defendant had no odor of alcohol or glassy eyes, defendant was not sweating or fidgeting, and defendant did not make contradictory statements. The court also found that Officer Payne knew defendant "had a history of 'drug charges and various felonies'" and the officer, upon speaking with defendant after checking defendant's documents, "noticed an extremely strong odor coming from the vehicle." The trial court found that the officer "described it as 'like a fragrance, cologne-ish, strong[,]'" and "more like an incense than what someone would wear." Officer Payne also "believed the odor was what is commonly referred to as a cover scent -- a fragrance or air freshener typically sprayed or released in a vehicle to mask or cover the smell of drugs like marijuana."

Based on these findings, the trial court noted that, "[f]or argument's sake," it "would find that Officer Payne did not have reasonable, articulable suspicion that criminal activity was afoot -- mere cologne odor and previous felony conviction aren't enough." The court further noted there was "[n]o evidence of extreme nervousness, failure to maintain eye contact, [or] conflicting stories about registration[] [or] destination," and there were "no invalid documents."

We agree with the trial court that a strong incense-like fragrance, which the officer believes to be a "cover scent," and a known felony and drug history are not, without more, sufficient to support a finding of reasonable suspicion of criminal activity. Instead, our case law tends to show that some additional evidence of criminal activity is necessary for an officer to develop a reasonable and articulable suspicion. *Compare Myles*, 188 N.C. App. at 47, 50, 51, 654 S.E.2d at 756, 758 (holding no reasonable suspicion existed to extend traffic stop when rental car occupants' stories did not conflict, there was no odor of alcohol, officer found no contraband or weapons upon frisking driver, and driver's license was valid, despite fact that driver's "heart was beating unusually fast" and rental car was one day overdue), *Jackson*, 199 N.C. App. at 242-43, 681 S.E.2d at 497 (holding officer did not have reasonable suspicion to extend traffic stop when "occupants of the vehicle had been cooperative with the officers throughout the stop," officer "confirmed 'there were no problems with any of these folks'" while checking validity of driver's

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license, and “there were no pending warrants for any of the vehicle’s occupants”), *State v. Sinclair*, 191 N.C. App. 485, 491, 663 S.E.2d 866, 871 (2008) (holding no reasonable suspicion existed where only facts tending to show criminal activity were that officers “‘received information about drug activity[,]’” “scene of the attempted stop was a known drug activity area,” and officer “had made prior drug arrests in the area”) *with State v. Fisher*, 219 N.C. App. 498, 504, 725 S.E.2d 40, 45 (2012) (holding reasonable suspicion present based on defendant’s nervousness, “smell of air freshener, inconsistency with regard to travel plans,” and “driving a car not registered to the defendant”), *cert. denied*, ___ U.S. ___, 187 L. Ed. 2d 279, 134 S. Ct. 420 (2013); *State v. Euceda-Valle*, 182 N.C. App. 268, 274-75, 641 S.E.2d 858, 863 (2007) (holding reasonable suspicion present based on defendant’s extreme nervousness, refusal to make eye contact, smell of air freshener from vehicle, and conflict in defendant’s and passenger’s stories about their trip), *and State v. Hernandez*, 170 N.C. App. 299, 309, 612 S.E.2d 420, 426, 427 (2005) (holding reasonable suspicion present based on defendant’s acting “‘very nervous,’” defendant giving conflicting statements, and trooper’s observation of several air fresheners in vehicle giving off “‘strong odor’”).

Thus, the trial court correctly determined that Officer Payne did not have reasonable, articulable suspicion to extend the traffic stop after the original purposes for the stop had been completely addressed. We note that although the State does not expressly challenge the trial court’s determination that Officer Payne did not have reasonable suspicion to extend the stop, the State does argue that, given the court’s findings about the fragrance and the loud music, the officer’s “observations . . . required investigation” and that “Officer Payne would have been remiss in his duties had he not asked questions to complete his investigation.” To the extent that the State contends that the officer could, under the circumstances of this case, continue to question defendant in the absence of reasonable suspicion or consent, the State’s argument is foreclosed by *Myles* and the Supreme Court’s decision in *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166 (2012) (“[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver’s consent or reasonable articulable suspicion that illegal activity is afoot.”).

Since Officer Payne did not have reasonable suspicion to extend the stop, we next address whether defendant consented to further detention after Officer Payne had fully addressed the initial purpose of the stop. The trial court concluded that up until the time defendant consented to the search, he remained seized by Officer Payne. In support of its conclusion, the trial court found that Officer Payne never returned defendant’s

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license. The court also found that defendant denied consent to search, indicated he did not want the officer to call a drug dog, and “told the officer he just wanted to go home.” Further, defendant “confirmed he didn’t get his license back and never felt free to leave.” The State does not contend that defendant was free to leave at any point.

“Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee’s driver’s license and registration.” *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497. Indeed, at times, even the return of documentation is not sufficient to make further detention during a traffic stop consensual. *See id.* (“Furthermore, the return of documentation would render a subsequent encounter consensual *only if* a reasonable person under the circumstances would believe he was free to leave or disregard the officer’s request for information.” (quoting *Kincaid*, 147 N.C. App. at 99, 555 S.E.2d at 299)).

Since defendant was not given his license back; defendant was not told he could leave; defendant was continuously questioned by the officer after the original purpose for the stop had been addressed until defendant ultimately consented to a search, despite defendant’s statements that he wanted to go home and that he did not want a drug dog called; and defendant was told the officer was going to call a drug dog to sniff defendant’s car, the trial court correctly found that defendant’s detention never became consensual in this case. *See id.* (“As a reasonable person under the circumstances would certainly not believe he was free to leave without his driver’s license and registration, [the officer’s] continued detention and questioning of [the driver] after determining that [the driver] had a valid driver’s license was not a consensual encounter.”).

Recognizing that defendant remained seized throughout the encounter and that Officer Payne did not have reasonable, articulable suspicion that defendant was engaged in criminal activity, the trial court concluded, and the State argues on appeal, that this case is controlled by this Court’s precedent allowing for a “*de minimis*” extension of a traffic stop for the purpose of conducting a drug dog sniff even without reasonable suspicion or consent. *See State v. Brimmer*, 187 N.C. App. 451, 455, 653 S.E.2d 196, 198 (2007) (adopting rule that if detention is prolonged for very short period of time in order to complete a dog sniff, intrusion is considered *de minimis*); *State v. Sellars*, 222 N.C. App. 245, 252, 730 S.E.2d 208, 212 (2012) (following *Brimmer* and applying *de minimis* rule), *appeal dismissed and disc. review denied*, 366 N.C.

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395, 736 S.E.2d 489, *cert. denied*, ___ U.S. ___, 187 L. Ed. 2d 317, 134 S. Ct. 471 (2013). We disagree.

The United States Supreme Court held in *Illinois v. Caballes*, 543 U.S. 405, 410, 160 L. Ed. 2d 842, 848, 125 S. Ct. 834, 838 (2005), that “[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.” This Court subsequently followed *Caballes* in *State v. Branch*, 177 N.C. App. 104, 108, 627 S.E.2d 506, 509 (2006) (“[B]ased on *Caballes*, once [the defendant] was detained to verify her driving privileges, [the two deputies] needed no heightened suspicion of criminal activity before walking [the drug dog] around her car.”).

In *Brimmer*, this Court adopted the United States Court of Appeals for the Eighth Circuit’s interpretation of *Caballes* in *United States v. Alexander*, 448 F.3d 1014 (8th Cir. 2006), and held that if a traffic stop is prolonged for only a very short period of time in order to conduct a dog sniff, the intrusion is considered “*de minimis*” such that “even if the traffic stop has been effectively completed, the sniff is not considered to have prolonged the detention beyond the time reasonably necessary for the stop.” 187 N.C. App. at 455, 653 S.E.2d at 198. Since the dog sniff in *Brimmer* only extended the stop for slightly over one and a half minutes, the Court held that the extension was *de minimis*, and the officer needed no reasonable suspicion or consent in order to prolong the stop for the dog sniff. *Id.* at 457, 458, 653 S.E.2d at 199, 200. This Court again applied the *de minimis* rule in *Sellars* and held that the extension of a traffic stop for four minutes and 37 seconds for the purpose of a dog sniff was *de minimis* and did not violate the defendant’s Fourth Amendment rights. 222 N.C. App. at 252, 730 S.E.2d at 213.

We do not believe that the *de minimis* analysis applied in *Brimmer* and *Sellars* should be extended to situations when, as here, a drug dog was not already on the scene. *Brimmer* was based, in part, on *Caballes*’ holding that a dog sniff conducted during an otherwise lawful stop did not implicate the Fourth Amendment, 543 U.S. at 410, 160 L. Ed. 2d at 848, 125 S. Ct. at 838, and the reasoning of that holding is inapplicable in the absence of an actual dog sniff or the immediate availability of a drug dog.

As this Court noted in *Sellars*, the Court’s earlier decision in *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360, held that an officer could not conduct a dog sniff after the original purpose of a traffic stop had been completed without grounds providing reasonable and articulable

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suspicion. The *Sellers* Court concluded, however, that “[t]he difference between *Falana* and *Brimmer* is that *Brimmer* incorporated the analysis contained in later United States Supreme Court and federal cases that were not in existence at the time *Falana* was decided,” with the “[m]ost significant” being *Caballes* and “subsequent federal District Court and Court of Appeals decisions interpreting *Caballes*.” 222 N.C. App. at 250, 730 S.E.2d at 211.

In *Caballes*, the Supreme Court was addressing a dog sniff that occurred during the course of a lawful traffic stop. The Court, however, specifically noted a distinction between a dog sniff occurring during a routine traffic stop and one occurring during an “unreasonably prolonged traffic stop.” 543 U.S. at 407, 160 L. Ed. 2d at 846, 125 S. Ct. at 837 (citing *People v. Cox*, 202 Ill.2d 462, 782 N.E.2d 275 (2002)).

In addition, the federal decisions on which *Brimmer* relied in adopting the *de minimis* exception limited that exception to situations in which the officer “ha[d] at his *immediate disposal* the canine resources to employ this uniquely limited investigative procedure” of a drug sniff. *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 649 (8th Cir. 1999) (emphasis added). In that case, the canine was already on the scene at the time of the stop. *Id.* at 645-46. Likewise, in *Alexander*, 448 F.3d at 1015-16, the defendant was stopped by a canine officer who had his drug-sniffing dog in his patrol car, and the stop was prolonged by only four minutes to conduct a dog sniff after the defendant was notified that he would receive a warning ticket.

Consequently, *Brimmer* must be limited to the situation in which a drug-sniffing dog is available at the scene of the traffic stop prior to completion of the purpose of the stop. Indeed, no North Carolina appellate court has held, as the trial court ruled here, that the *de minimis* exception applies when a canine has not already been called to the scene prior to completion of the lawful stop. In *Brimmer*, 187 N.C. App. at 453, 653 S.E.2d at 197, the canine had arrived prior to completion of the lawful purpose of the stop, while in *Sellers*, 222 N.C. App. at 246-47, 730 S.E.2d at 209, the dog was present in the back of the patrol car during the entire stop.

Moreover, in *Williams*, the Supreme Court specifically considered the constitutionality of an officer’s extending a stop after its lawful purpose was completed by (1) asking questions, (2) requesting consent to search the defendant’s car, (3) subsequently calling for a drug-sniffing canine, and (4) having a drug sniff conducted. 366 N.C. at 112, 116-18, 726 S.E.2d at 164, 166-68. Although the officer’s conduct only extended

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the stop by 14 minutes, the Supreme Court did not conduct a *de minimis* analysis, but rather held that the extension, including the drug sniff, was *only* permissible if supported by reasonable, articulable suspicion or consent. *Id.* at 116, 726 S.E.2d at 166. In support of this holding, the Court, *id.*, 726 S.E.2d at 166-67 (emphasis added), cited *Florida v. Royer*, 460 U.S. 491, 498, 75 L. Ed. 2d 229, 236, 103 S. Ct. 1319, 1324 (1983), as “declaring that, absent consent to a voluntary conversation or to a search, a law enforcement officer may not detain a person ‘*even momentarily*’ without reasonable, objective grounds for doing so.” Thus, when the dog was summoned after completion of the purpose of the traffic stop, the Supreme Court required a showing of reasonable, articulable suspicion for the stop to be prolonged in order to conduct the dog sniff.

Here, however, the State appears to be arguing that even in the absence of reasonable, articulable suspicion, defendant’s consent to a search was valid because it was obtained by Officer Payne threatening to have a dog sniff defendant’s car – an action the State contends, based on the *de minimis* cases, that Officer Payne was constitutionally allowed to do. As this Court has acknowledged, “[a]s a general rule, it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case.” *State v. Paschal*, 35 N.C. App. 239, 241, 241 S.E.2d 92, 94 (1978) (quoting 25 Am. Jur. 2d., *Duress & Undue Influence*, § 18, p. 375).

The State has not, however, shown that Officer Payne had a legal right to conduct a dog sniff at the time that defendant gave his consent to a search. “[A]t the suppression hearing,” the State has the burden “of demonstrating with particularity a constitutionally sufficient justification of the officers’ search. . . .” *State v. Crews*, 66 N.C. App. 671, 675, 311 S.E.2d 895, 897 (1984) (second emphasis added) (quoting *Cooke*, 306 N.C. at 136, 291 S.E.2d at 620).

First, Officer Payne did not have a canine at his “immediate disposal” since he had not yet called for a canine. \$404,905.00 in U.S. Currency, 182 F.3d at 649. While in *Brimmer* and *Sellars*, the canine was already on the scene, Officer Payne testified at the suppression hearing that “[a]s a general rule, it typically takes no more than ten minutes, typically five, sometimes less” for a canine unit to arrive at the scene after it has been called. Since *Brimmer* approved extension of a stop for only slightly over one and a half minutes, 187 N.C. App. at 457, 653 S.E.2d at 199, and *Sellars* approved only an extension of four minutes and 37 seconds, 222 N.C. App. at 252, 730 S.E.2d at 213, just the projected time for arrival of

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the canine, in this case, was substantially in excess of the time periods previously found to be *de minimis* by North Carolina courts.

Moreover, at the time defendant consented to a search, approximately two minutes had already elapsed since the purpose for the traffic stop had been achieved. Consequently, even if *Brimmer* and *Sellars* could apply despite the failure to summon a canine unit before the traffic stop was completed, the State's evidence indicated that the stop would have to be extended by between seven and 12 minutes in order for the canine to arrive. In other words, just waiting for the canine would have more than doubled the length of the stop. In addition, the State presented no evidence regarding how long it would take for the canine to deploy and alert.

Thus, even assuming that the *de minimis* rule could apply in the absence of immediate availability of a dog, the State did not present evidence that Officer Payne obtained defendant's consent to search by threatening to do something – a dog sniff – that he had a legal right to do. Based on the State's evidence, Officer Payne did not have the legal right to conduct a dog sniff because he did not have a canine at his immediate disposal and, in any event, the State did not establish that Officer Payne could have completed the dog sniff in a *de minimis* period of time. The State has cited no case suggesting that consent may properly be obtained by a threat to perform an act that might or might not be legal depending on how the threatened event hypothetically could unfold.² The State has, therefore, failed to prove that defendant's consent was valid.

The State nonetheless cites *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002), *State v. McMillan*, 214 N.C. App. 320, 718 S.E.2d 640 (2011), and *State v. Cummings*, 188 N.C. App. 598, 656 S.E.2d 329 (2008), in support of its argument that defendant's consent to search was valid in this case. However, in *Barden*, *McMillan*, and *Cummings*, there was no indication that the respective defendants were unconstitutionally seized when they gave consent to searches or seizures of items. *See Barden*,

2. We also note that the State's argument requires that we review the videotape of the encounter with a stopwatch in hand calculating the minutes and seconds elapsing for each stage of the stop and then adding to the time by which the stop was actually extended estimates of the additional time that might typically be necessary for a canine unit to arrive. Then, we must determine how many additional minutes of detention are too many. Is seven minutes waiting for a dog too much? Eight minutes? Nine minutes? What is the basis for making that decision? Constitutional rights should not hinge on such arbitrary calculations and determinations. With *Brimmer* and *Sellars*, since the dog was already there and the stop was extended only by the time necessary for the dog to sniff the vehicle and alert, such arbitrariness was not present.

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356 N.C. at 341, 572 S.E.2d at 125-26 (holding defendant's consent to seizure of his shoes was valid when defendant voluntarily drove to site of police interview and voluntarily gave statements concerning crime); *McMillan*, 214 N.C. App. at 331, 718 S.E.2d at 648 (holding defendant's consent to seizure of physical items was valid when defendant voluntarily went to sheriff's department, was informed he was under "investigative detention," and was told he could either consent to seizure of items or officers would detain him until they could prepare and execute search warrant for items, since officers "reasonably believed they had sufficient probable cause" to obtain search warrant); *Cummings*, 188 N.C. App. at 603-04, 656 S.E.2d at 332-33 (holding defendant's consent to search of his vehicle voluntarily given when defendant agreed to go to law enforcement headquarters for questioning and while at headquarters, signed consent form for search of vehicle). Those cases are, therefore, inapplicable here.³

In sum, after Officer Payne had addressed the original purpose for the traffic stop, he continued to detain defendant without either (1) defendant's valid consent or (2) reasonable, articulable suspicion of criminal activity. Accordingly, the officer's continued detention of defendant violated defendant's Fourth Amendment right against unreasonable seizures and defendant's subsequent consent to a search of his car was involuntary as a matter of law. *See Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758 ("Since [the officer's] continued detention of defendant was unconstitutional, defendant's consent to the search of his car was involuntary.").

Because defendant's consent to search his car was the product of an unconstitutional seizure, the trial court erred in denying defendant's motion to suppress. Accordingly, we reverse and remand to the trial court for entry of an order vacating defendant's guilty pleas.

Reversed and remanded.

Judges STEPHENS and ERVIN concur.

3. Although the State also cites *State v. Wrenn*, 316 N.C. 141, 146, 147, 340 S.E.2d 443, 447, 448 (1986), the defendant in *Wrenn* was lawfully arrested at the time his car was searched, and the search was, therefore, a valid search incident to the defendant's arrest.

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[234 N.C. App. 753 (2014)]

STATE OF NORTH CAROLINA

v.

COREY LAMONT McCLAMB

No. COA13-996

Filed 1 July 2014

Child Abuse, Dependency, and Neglect—felony child abuse by sexual act—vaginal intercourse

The trial court did not err by denying defendant's motion to dismiss the charge of felony child abuse by a sexual act based on vaginal intercourse. Contrary to defendant's assertion, the General Assembly intended the term "sexual act," as it is used in N.C.G.S. § 14-318.4(a2) of Article 39, to include vaginal intercourse.

Appeal by Defendant from Judgments entered 11 February 2013 by Judge C. W. Bragg in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2014.

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

David L. Neal for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

On 11 July 2011, Defendant Corey Lamont McClamb was indicted on three counts of felony child abuse by sexual act under N.C. Gen. Stat. § 14-318.4(a2); three counts of indecent liberties with a child under N.C. Gen. Stat. § 14-202.1; one count of statutory rape or sexual offense of a person who is thirteen, fourteen, or fifteen years old when the perpetrator is at least six years older than the victim under N.C. Gen. Stat. § 14-27.7A(a); and two counts of intercourse and sexual offense with a child under N.C. Gen. Stat. § 14-27.7(a). The first count of felony child abuse by sexual act was based on vaginal intercourse, the second count was based on cunnilingus, and the third count was based on fellatio. On 6 February 2012, Defendant was indicted under section 14-27.7A(a) on one additional count of statutory rape or sexual offense of a person who is thirteen, fourteen, or fifteen years old when the perpetrator is at least six years older than the victim and two counts of intercourse and sexual offense with a child under section 14-27.7(a). The case came on for trial

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on 4 February 2013. At trial, the State's relevant evidence tended to show the following:

"Jane,"¹ Defendant's biological daughter, began living with Defendant at his residence in Alabama when she was eight years old and Defendant was approximately thirty-three years old. While Jane was there, Defendant made her perform oral sex on him. According to Jane, this occurred four or five times a month. Additionally, Defendant once kissed Jane by putting his tongue in her mouth when she was "around [nine] or [ten]." When Jane "turned [ten], [Defendant also] tried to put his penis in [Jane's] vagina, but it hurt, and he stopped."

When Jane was eleven or twelve, Defendant sent her to live with his great aunt in Georgia. At the end of the school year, Defendant retrieved Jane from Georgia and brought her back to his residence in Alabama. When Jane returned, Defendant made her perform oral sex on him roughly "four times a month." Approximately six months after arriving in Alabama, when Jane was "around . . . [thirteen]," Defendant sent Jane to Winston-Salem, North Carolina to live with his friend. About a year later, Defendant joined Jane in Winston-Salem, and they moved to a homeless shelter. Roughly six months after that, "around [June of 2009]," when Jane was fourteen years old, Defendant and Jane moved into an apartment in Winston-Salem.

Jane testified that "many times . . . at night [in the new Winston-Salem residence, Defendant] came into [her] room, and [Defendant] made [her] perform oral sex on [him]. [Defendant would also perform] oral sex on [her]." Defendant engaged in vaginal intercourse with Jane. This occurred for the first time when Jane was fourteen years old. Defendant came into Jane's bedroom, made her perform oral sex on him, performed oral sex on her, and "put his penis in [Jane's] vagina." Defendant would force Jane to have vaginal intercourse with him "[s]ix times a month." The vaginal intercourse took place in Jane's bedroom, in Defendant's bedroom, and once in the living room. A forensics expert for the State testified that Defendant's semen was found on Jane's comforter. The sexual assault nurse examiner testified that Jane's vagina exhibited a tear, swelling, and redness that was consistent with Jane's testimony.

Defendant denied molesting or raping Jane. He testified that his semen was likely on Jane's comforter because Jane left it in the

1. A pseudonym is used to protect the juvenile's identity.

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living room, where Defendant “probably used [it] one time” with one of his girlfriends.

At the close of all the evidence, Defendant moved to dismiss the charges against him, including the three counts of felony child abuse by sexual act. The trial court denied the motion. After closing arguments, the trial court instructed the jury on felonious child abuse by sexual act and defined sexual act to include vaginal intercourse. Following deliberations, the jury found Defendant guilty on eleven of the twelve charges and returned no verdict on one count of statutory rape. Except for the three charges of felony child abuse by a sexual act, the jury also found that Defendant abused a position of trust or confidence in the commission of these crimes. On 11 February 2013, Defendant was sentenced to three consecutive terms of 456 months to 557 months incarceration. Defendant gave notice of appeal in open court.

Discussion

The sole issue on appeal is whether the trial court erred in denying Defendant’s motion to dismiss as it pertains to the single charge of felony child abuse by a sexual act based on vaginal intercourse. Defendant argues that the court erred because he could not “legally be convicted” of the charge under the trial court’s definition of sexual act. We disagree.

“In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial.” N.C.R. App. P. 10(a)(3). “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 [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 omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “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).

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Defendant argues that the trial court erred in denying his motion to dismiss because the term “sexual act” does not include vaginal intercourse under N.C. Gen. Stat. § 14-318.4(a2). Specifically, Defendant asserts that we are bound by our determination in *State v. Stokes*, 216 N.C. App. 529, 532, 718 S.E.2d 174, 176-77 (2011), that the definition of sexual act in Article 7A, section 14-27.1(4), which explicitly excludes vaginal intercourse as a sexual act, “control[s] in the felony child abuse by sexual act cases [under Article 39].” We disagree.

The relevant statutory provisions are as follows:

ARTICLE 7A. RAPE AND OTHER SEX OFFENSES**§ 14-27.1. Definitions.**

As used in this Article, unless the context requires otherwise:

....

(4) “Sexual act” means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse.

....

§ 14-27.2. First-degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(1) With a victim who is a child under the age of [thirteen] years and the defendant is at least [twelve] years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

....

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§ 14-27.4. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of [thirteen] years and the defendant is at least [twelve] years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

....

ARTICLE 39. PROTECTION OF MINORS.

....

§ 14-318.4. Child abuse a felony.

....

(a2) Any parent or legal guardian of a child less than [sixteen] years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony.

N.C. Gen. Stat. §§ 14-27.1(4), -27.2(a), -27.4(a), -318.4(a2) (2013).

In response to Defendant's argument, the State asserts that vaginal intercourse is a part of the definition of "sexual act" for the purposes of section 14-318.4(a2) because our holding in *Stokes* "[does] not specifically address the issue of whether . . . the statutory definition of ['sexual act'] in [section] 14-27.1(4) applies to Article 39 offenses." To support its assertion, the State makes the following three arguments:

First, the "legislature clearly indicated that the definition of the term 'sexual act' under [section] 14-27.1(4) applies solely to offenses . . .

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within Article 7[A] by including the language, ‘as used in this Article,’ at the beginning of the statutory section defining terms for Article 7[A].” Second, incorporation of an Article 7A definition into Article 39 is contrary to legislative intent because the reason to distinguish sexual act from vaginal intercourse in Article 7A is “to distinguish rape from first and second degree sexual offense and other sexual offense references within Article 7[A].” As the State points out, “[t]he usage of the two terms indicates that the [General Assembly] intended such a distinction under Article 7[A] to reduce the possibility of confusion between vaginal intercourse for rape and a sexual act for a sexual offense.” *See generally State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981) (“The only sexual act excluded from the statutory definition [in Article 7A] relates to vaginal intercourse, a necessary omission because vaginal intercourse is an element of the crimes of first and second degree rape . . .”). The State contends that while the need to distinguish between a “sexual act” and vaginal intercourse exists when punishing rape and other sexual offenses differently, the distinction is not necessary where one statute is designed to punish the sexual abuse of children in its entirety. Third, the State points to Article 27A’s definition of “aggravated offense” to show the legislature’s intention to include vaginal intercourse within the meaning of “sexual act” for non-Article 7A offenses. That definition provides that an aggravated offense includes “engaging in a sexual act involving vaginal, anal, or oral penetration.” We fully agree with the State’s position.

We conclude that our holding in *Stokes* is controlling with respect to the meaning of the term “sexual act” as used in section 14-318.4(a2) only in light of the narrow factual circumstances and legal issue raised therein. The defendant in *Stokes* was charged with violating section 14-318.4(a2) of Article 39. 216 N.C. App. at 532, 718 S.E.2d at 176-77. On appeal, we addressed whether the State presented sufficient evidence that the defendant violated section 14-318.4(a2) when he digitally penetrated the victim’s vagina. *Id.* Citing the Article 7A definition of “sexual act,” which includes penetration by any object into the genital opening of another person’s body, we concluded that digital vaginal penetration constitutes a sexual act. *See id.* We did not hold, however, that the Article 7A definition of sexual act applies to exclude vaginal intercourse as a sexual act under Article 39. That question simply was not present in *Stokes*.²

2. This Court’s discussion in *State v. Lark*, 198 N.C. App. 82, 88–89, 678 S.E.2d 693, 698–99 (2009), is similarly limited to an analysis of fellatio as a sexual act under the Article 7A definition when applied to an Article 39 prosecution. *Lark* likewise does not address whether vaginal intercourse constitutes a sexual act under Article 39.

WIGGINS & SMALL v. E. CAROLINA HEALTH-CHOWAN

[234 N.C. App. 759 (2014)]

Article 7A prefaces its list of definitions by clarifying that such definitions are specific to Article 7A “unless context requires otherwise.” N.C. Gen. Stat. § 14-27.1. In that article, a criminal “sexual act” is distinct from criminal “vaginal intercourse” because vaginal intercourse is separately addressed in the context of rape. No such distinction exists in Article 39. There is no separate provision involving vaginal intercourse and, thus, no need for any such distinction. Moreover, it would be absurd to conclude — as Defendant’s interpretation of *Stokes* would have us do — that a parent or guardian who engaged in *anal* intercourse with a child less than 16 years old, for example, would be guilty of felony child abuse under section 14-318.4(a2) while a parent or guardian who engaged in *vaginal* intercourse would not be guilty. Therefore, we hold that the General Assembly intended the term “sexual act,” as it is used in section 14-318.4(a2) of Article 39, to include vaginal intercourse. Accordingly, we find no error.

NO ERROR.

Judges BRYANT and DILLON concur.

LAKISHA WIGGINS AND G. ELVIN SMALL, AS GUARDIAN AD LITEM FOR
ROY LEE BROTHERS, A MINOR, PLAINTIFFS

v.

EAST CAROLINA HEALTH-CHOWAN, INC. D/B/A CHOWAN HOSPITAL AND
MICHAEL DAVID GAVIGAN, M.D., DEFENDANTS

No. COA13-1428

Filed 1 July 2014

Medical Malpractice—medical negligence—sudden emergency doctrine inapplicable

The trial court erred by instructing the jury on the sudden emergency doctrine because the doctrine is not applicable in medical negligence actions and was therefore misleading and likely affected the outcome of the trial.

Appeal by plaintiffs from judgment entered 15 April 2013 by Judge Gary E. Trawick in Chowan County Superior Court. Heard in the Court of Appeals 22 April 2014.

WIGGINS & SMALL v. E. CAROLINA HEALTH-CHOWAN

[234 N.C. App. 759 (2014)]

Charles G. Monnett III & Associates, by Charles G. Monnett III, for plaintiffs-appellants.

Harris, Creech, Ward and Blackerby, P.A., by Charles E. Simpson, Jr. and Thomas E. Harris, for defendant-appellee.

HUNTER, Robert C., Judge.

Lakisha Wiggins (“Ms. Wiggins”) and G. Elvin Small, guardian ad litem for Ms. Wiggins’s son, Roy Lee Brothers, (“Roy”) (collectively “plaintiffs”) appeal from judgment entered on 15 April 2013 in favor of East Carolina Health-Chowan, Inc. d/b/a Chowan Hospital (“Chowan Hospital” or “defendant”) on plaintiffs’ medical negligence claim.¹ On appeal, plaintiffs argue that the trial court erred by: (1) instructing the jury on the sudden emergency doctrine; and (2) failing to instruct the jury on defendant’s liability for unsuccessful or harmful subsequent medical treatment necessitated by defendant’s negligence.

After careful review, we hold that the trial court erred by instructing the jury on the sudden emergency doctrine and remand for a new trial.

BACKGROUND

The evidence presented at trial established the following facts: On Friday, 8 July 2005, Ms. Wiggins was admitted to Chowan Hospital for labor and delivery of her son, Roy. Labor was induced on Friday night but was discontinued until the following morning. Prior to Ms. Wiggins’s arrival at Chowan Hospital, there was no indication that anything was wrong with Roy or that he had suffered any injury. After a brief pause the night before, induction resumed at 8:08 a.m. on 9 July 2005 with the administration of the drug Pitocin. Though required by hospital protocols, no vaginal exam was conducted at this time. At around 12:54 p.m., a nurse performed a vaginal exam on Ms. Wiggins and discovered an umbilical cord prolapse.

A cord prolapse is a condition where the umbilical cord protrudes from the vagina. The baby’s blood supply and oxygen may become compromised if the cord is compressed. Low blood flow and low oxygen can cause damage to a baby’s brain. Standards of practice require a baby to be delivered as soon and as safely as possible by emergency cesarean section (“C-section”) in the event of a cord prolapse.

1. Dr. Michael Gavigan (“Dr. Gavigan”) was also named as a defendant in plaintiffs’ complaint. He is no longer a defendant to this suit and is not a party in this appeal.

WIGGINS & SMALL v. E. CAROLINA HEALTH-CHOWAN

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After discovering the cord prolapse, the nurses immediately called the attending physician, Dr. Gavigan, and preparations were made for an emergency C-section. It took sixteen minutes to move Ms. Wiggins into the operating room. Dr. Gavigan proceeded with the C-section under local anesthetic.

Roy was delivered at 1:30 p.m. with APGAR scores of 0 at one minute after birth, 3 at five minutes, and 7 at ten minutes. An APGAR score is a test designed to evaluate a newborn's physical condition using a score of 0-10 and to determine whether any immediate additional or emergency care is needed. Dr. Charles O. Harris, a practicing obstetrician, testified at trial that an APGAR score of 0 means the baby had no heart rate, no respiratory rate, and no muscle tone. He further testified that "[Roy's] ten minute APGAR was seven which is normal" and stated that Roy's initial resuscitation by the pediatric team "went well."

Following delivery, Roy was transferred to The Children's Hospital of the King's Daughters in Norfolk, Virginia ("The Children's Hospital") for further treatment. At the time, The Children's Hospital was a participant in clinical trials for an experimental cooling procedure that is used on newborns who suffer brain damage due to low oxygen or blood flow at birth. The cooling is meant to reduce the metabolic needs of a newborn's brain tissue to help prevent long-term damage. This procedure was performed on Roy when the transport team arrived. However, the procedure was discontinued after Roy experienced a second episode of low oxygen while being cooled.

Plaintiffs filed a complaint against Chowan Hospital and Dr. Gavigan on 27 June 2008 alleging that Roy sustained severe brain injury as a proximate result of defendants' failure to perform a C-section in a timely manner. According to the complaint, Roy has permanent cognitive impairments and loss of motor control due to the complications with his birth. At trial, plaintiffs presented testimony of liability expert Dr. Fred Duboe ("Dr. Duboe"), who testified that Chowan Hospital's nurses were negligent by failing to: (1) perform a vaginal exam immediately before administering Pitocin as required by the applicable standards of practice and the hospital's own protocols; (2) notify Dr. Gavigan of the results of the vaginal exam that should have been performed; (3) give Terbutaline to slow or stop Ms. Wiggins's contractions after the cord prolapse occurred; and (4) move Ms. Wiggins to the operating room expediently before Roy's delivery by emergency C-section.

Several expert witnesses at trial testified that a cord prolapse is uncommon and qualifies as a medical emergency. All of the healthcare

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providers and experts who testified at trial agreed that Ms. Wiggins did not have any risk factors for a cord prolapse.

During the charge conference, defendants requested and the trial court agreed to give an instruction regarding the sudden emergency doctrine, which lessens the standard of care for a defendant in certain emergency situations; plaintiffs preserved their objections to the instruction. The jury returned a verdict in favor of defendants on 20 March 2013, and judgment was filed 15 April 2013. Plaintiffs timely filed and served notice of appeal.

DISCUSSION**I. Jury Instruction on the Sudden Emergency Doctrine**

Plaintiffs argue that the trial court erred by instructing the jury on the sudden emergency doctrine because the doctrine is not applicable in medical negligence actions and was therefore misleading and likely affected the outcome of the trial. We agree.

The trial court is responsible for ensuring that the jury is properly instructed before deliberations begin. *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987) (“It [is] the duty of the [trial] court to instruct the jury upon the law with respect to every substantial feature of the case.”). A trial court’s primary purpose in instructing the jury is “the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *Littleton v. Willis*, 205 N.C. App. 224, 228, 695 S.E.2d 468, 471 (2010). In considering whether to give a requested jury instruction, the evidence must be viewed in the light most favorable to the party requesting the instruction. *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006). On appeal, this Court should consider the jury charge contextually and in its entirety. *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006).

The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

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Id. (citations and quotation marks omitted).

The North Carolina Pattern Jury Instruction for the standard of care in a medical negligence case is based on the duties enunciated in *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 765 (1955), and later codified into N.C. Gen. Stat. § 90-21.12 (2013).² It provides that a plaintiff needs to prove that the defendant was negligent in providing medical care by establishing a violation of any one of the following duties:

- (1) The duty to use their best judgment in the treatment and care of their patient;
- (2) The duty to use reasonable care and diligence in the application of their knowledge and skill to their patient's care; and
- (3) The duty to provide healthcare in accordance with the standards of practice among members of the same healthcare profession with similar training and experience situated in the same or similar communities at the time the healthcare is rendered.

N.C.P.I. –Civ. 809.00A (2013).

Here, in addition to giving the pattern instruction for the healthcare professional standard in N.C.P.I.-Civ. 809.00A, the trial court also used the following pattern jury instruction requested by defendants on the sudden emergency doctrine:

2. We note that the General Assembly recently amended section 90.21-12 to address the precise issue raised in this appeal. Subsection (b) provides:

(b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in the treatment of an emergency medical condition, as the term “emergency medical condition” is defined in 42 U.S.C. § 1395dd(e)(1)(A), the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence.

N.C. Gen. Stat. § 90-21.12(b). Thus, rather than lowering the applicable standard of care, as with the sudden emergency doctrine, the General Assembly elected to raise the burden of proof for medical negligence actions arising from treatment of emergency medical conditions. However, because this amendment altered rather than clarified the law, and the facts which form the basis of this cause of action occurred prior to the amended statute's effective date of 1 October 2011, we cannot apply this provision here. *See Ray v. N.C. Dep't. of Transp.*, 366 N.C. 1, 8-10, 727 S.E.2d 675, 681-82 (2012) (“In the event that the amendment is a substantive change in the law, the effective date will apply.”); *see also* 2011 Sess. Laws 400 § 11 (noting that section 90-21.12(b) “become[s] effective October 1, 2011, and appl[ies] to causes of actions arising on or after that date”).

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A person who, through no negligence of his own, is suddenly and unexpectedly confronted with imminent danger to himself and others, whether actual or apparent, is not required to use the same judgment that would be required if there were more time to make a decision. The person's duty is to use that degree of care which a reasonable and prudent person would use under the same or similar circumstances. If, in a moment of such emergency, a person makes a decision that a reasonable and prudent person would make under the same or similar conditions, he does all that the law requires, even if in hindsight some different decision would have been better or safer.

N.C.P.I.—Civ. 102.15 (2013).

The applicability of the sudden emergency doctrine in medical negligence actions is an issue of first impression in North Carolina. Plaintiffs argue that the sudden emergency doctrine does not apply in medical negligence actions because medical emergencies are already contemplated and built-in to the standard of care for medical professionals; thus, plaintiffs argue that the trial court's charge to consider a what a "reasonable and prudent person" would do in a medical emergency was misleading to the jury, where they were also instructed to consider defendant's actions "in accordance with the standards of practice among members of the same healthcare profession." Defendant argues that the sudden emergency doctrine is equally applicable in medical negligence cases as it is in ordinary negligence cases. Defendant further contends that the instruction regarding the sudden emergency doctrine was not misleading when considered contextually in light of the entire jury charge.

In a general negligence action in North Carolina, the sudden emergency instruction can be requested when a party presents substantial evidence showing that a party (1) perceived an emergency situation and reacted to it, and (2) the emergency was not created by that party's own negligence. *Carrington*, 179 N.C. App. at 829-30, 635 S.E.2d at 534. "The doctrine of sudden emergency creates a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others." *Marshall v. Williams*, 153 N.C. App. 128, 131, 574 S.E.2d 1, 3 (2002) (citation and quotation marks omitted).

The state of the law on the doctrine of sudden emergency has been thoroughly stated by our courts. One who is

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required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated would have been.

Masciulli v. Tucker, 82 N.C. App. 200, 205-06, 346 S.E.2d 305, 308 (1986) (citation and quotation marks omitted).

Because our Courts have yet to address whether this doctrine applies to medical negligence cases, defendant relies on cases from Tennessee, New Mexico, and Massachusetts in which the appellate courts in those jurisdictions have affirmed application of the sudden emergency doctrine in the medical negligence context. In *Olinger v. Univ. Med. Ctr.*, 269 S.W.3d 560 (Tenn. Ct. App. 2008), the Tennessee Court of Appeals affirmed the trial court's jury instruction on the sudden emergency doctrine in a case involving labor and delivery that left the newborn baby with brachial plexus palsy. *Olinger*, 269 S.W.3d at 561. The doctor attempted two different maneuvers to resolve the shoulder dystrocia and it was found that the failure of those maneuvers was extremely rare. *Id.* at 565. Experts testified at trial that the failure of a doctor to resolve shoulder dystrocia with two typical maneuvers should be considered a medical emergency. *Id.* at 566. The court stated:

We agree with [p]laintiffs' argument that because of a physician's training and background, the sudden emergency doctrine has a limited application in medical malpractice cases. Simply because there is a medical complication does not necessarily mean that there is a sudden emergency. We are not, however, willing to go as far as argued by [p]laintiffs and hold that the sudden emergency doctrine never is applicable in a medical emergency situation.

Id. at 568-69.

In another case, the Tennessee Court of Appeals found material evidence of a sudden emergency when an individual with a minor cut on her finger subsequently experienced a vasovagal reaction after an emergency room doctor administered a numbing shot, and she subsequently fell off the gurney bed and developed a traumatic brain injury as a result of her fall. See *Ross v. Vanderbilt Uni. Med. Ctr.*, 27 S.W.3d 523, 525-26 (Tenn. Ct. App. 2000). The plaintiffs argued that the doctor was negligent because he left the bedside without putting up the bedrails, *id.* at 526, and "that the sudden emergency doctrine is not applicable in a medical malpractice case to lower the standard of acceptable professional practice required of an emergency room physician."

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Ross, 27 S.W.3d at 526, 529. The appellate court disagreed and held that “under the appropriate facts,” the sudden emergency doctrine may be applied in assessing an emergency room doctor’s fault. *Id.* at 530. In so holding, the court emphasized the importance of the sudden emergency doctrine in a comparative fault jurisdiction, while noting there may also be instances where the doctrine may come into play when no comparative fault is alleged. *Id.* at 527-28. The court also noted that the doctrine does not constitute a defense “as a matter of law,” and does not negate the defendant’s liability, but must be considered as a factor in the comparative fault analysis. *Id.*

Defendant also cites *Sutherland v. Fenenga*, 810 P.2d 353, 356 (N.M. Ct. App. 1991), where a 16-year-old boy who came into the emergency room with a sports injury to his knee died after an anesthesia machine malfunctioned during surgery, causing a rupture to his right lung. The New Mexico Court of Appeals held the defendant was entitled to an instruction on sudden medical emergency, which would have lowered the healthcare professionals’ standard of care. *Sutherland*, 810 P.2d at 360.

Finally, defendant cites *Linhares v. Hall*, 257 N.E.2d 429 (Mass. 1970), a case involving a medical negligence suit against an anesthesiologist after a minor plaintiff suffered a cardiac arrest during a routine tonsillectomy. The plaintiffs argued that cardiac arrest is always a possible complication during surgery and it should not be assumed to be “an emergency within the meaning of the emergency doctrine.” *Linhares*, 257 N.E.2d at 430. The appellate court disagreed and held “if an emergency did exist, a fact left to the determination of the jury, the defendant then and in that event was held to the exercise of a certain standard of care.” *Id.*

Based on these cases, defendant argues that the sudden emergency doctrine is equally applicable to healthcare providers in North Carolina as it is to a layperson, and thus the trial court’s instruction on the sudden emergency doctrine here was without error. For the following reasons, we disagree.

In North Carolina, the sudden emergency doctrine has been applied only to ordinary negligence claims, mostly those arising out of motor vehicle collisions, and has never been utilized in a medical negligence case. *See, e.g., McDevitt v. Stacy*, 148 N.C. App. 448, 458, 559 S.E.2d 201, 209 (2002); *Ligon v. Matthew Allen Strickland*, 176 N.C. App. 132, 141, 625 S.E.2d 824, 831 (2006); *Long v. Harris*, 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000). Even in cases where the facts giving rise to suit could presumably be categorized as sudden medical emergencies, the

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general standard of care for healthcare professionals has been sufficient to assess liability. *See O'Mara v. Wake Forest Univ. Health Services*, 184 N.C. App 428, 434, 646 S.E.2d 400, 404 (2007) (utilizing the healthcare professional standard where the plaintiff alleged that a child's spastic quadriparetic cerebral palsy was caused by oxygen deprivation during the final thirty minutes of birth); *Lentz v. Thompson*, 269 N.C. 188, 192, 152 S.E.2d 107, 110 (1967) (applying the standard of "professional knowledge and skill ordinarily had by those who practice that branch of the medical art or science" where the plaintiff's spinal accessory nerve was severed during surgery).

The application of the healthcare professional standard of care to a wide range of factual scenarios is not accidental. Our Supreme Court has described the standard for medical professionals as "*completely unitary in nature*, combining in one test the exercise of 'best judgment,' 'reasonable care and diligence' and compliance with the 'standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities.'" *Wall v. Stout*, 310 N.C. 184, 193, 311 S.E.2d 571, 577 (1984) (emphasis added) (holding that the passage of section 90-21.12 did not abrogate the duties of healthcare professionals created at common law). Part of the standard developed at common law is to examine a healthcare professional's conduct in light of the factual circumstances of the case. In *Brawley v. Heymann*, a semiconscious patient fell off of a narrow examining table to which he was not secured. *Brawley v. Heymann*, 16 N.C. App 125, 128, 191 S.E.2d 366, 367-368 (1972). This Court held that "[a] jury could reasonably conclude from such findings that defendant failed to give, or see that plaintiff was given, such care as a reasonably prudent physician in the same or similar circumstances would have provided[.]" *Id.* (emphasis added).

Thus, the standard of care for healthcare professionals, both at common law and as enunciated in section 90-21.12, is designed to accommodate the factual exigencies of any given case, including those that may be characterized as medical emergencies. Therefore, we hold that the sudden emergency doctrine is unnecessary and inapplicable in such cases, and the trial court's instruction on the sudden emergency doctrine here was "likely, in light of the entire charge, to mislead the jury." *Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177. Because this erroneous instruction likely misled the jury, we remand for a new trial.

Even if we were to hold that that the sudden emergency doctrine is applicable in medical negligence cases, the trial court's specific instructions here would still require a new trial. The trial court instructed the

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jury that it should assess defendant's actions in light of what a reasonable and prudent *person* would do when faced with the same emergency. However, even in cases from other jurisdictions where the sudden emergency doctrine was applied in medical negligence actions, the language used by those trial courts limited the standard to a reasonable health-care professional, not a reasonable person. For example, the sudden emergency instruction as given in *Olinger* was as follows:

A physician/nurse who is faced with a sudden or unexpected emergency that calls for immediate action is not expected to use the same accuracy or judgment as a person acting under normal circumstances who has time to think and reflect before acting. A physician/nurse faced with a sudden emergency is required to act within the recognized standard of care applicable to that physician or nurse. A sudden emergency will not excuse the actions of a person whose own negligence created the emergency.

Olinger, 269 S.W.3d at 564 (emphasis added). The sudden emergency instruction given in *Ross* reads:

A physician who is faced with a sudden or unexpected emergency that calls for immediate action is not expected to use the same accuracy of judgment as a physician acting under normal circumstances

Ross, 27 S.W.3d at 526-27 (emphasis added). Finally, the instruction that the defendant requested in *Sutherlin*, UJI Civ. 13-1113, was specifically designed for use in medical cases. *Sutherlin*, 810 P.2d at 360. UJI Civ. 13-1113 provided that:

A doctor who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger to the patient, is not expected nor required to use the same judgment and prudence that is required of the doctor in the exercise of ordinary care in calmer and more deliberate moments.

Id. (emphasis added).

Thus, when compared to the instructions in the cases cited favorably by defendant, the trial court's specific language here was far too general to be considered a sound application of the law. The charge instructs the jury to simultaneously apply the "standards of practice among *members of the same healthcare profession* with similar training and experience

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situated in the same or similar communities at the time the health care is rendered” in addition to the duty to “use that degree of care which a *reasonable and prudent person* would use under the same or similar circumstances.” These duties are incompatible. Healthcare professionals are held to a higher standard of care than laypersons. *See Leatherwood v. Ehlinger*, 151 N.C. App. 15, 20, 564 S.E.2d 883, 886 (2002) (“[B]ecause the practice of medicine involves a specialized knowledge beyond that of the average person, the applicable standard of care in a medical malpractice action must be established through expert testimony”), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003); *see also* N.C. Gen. Stat. 90-21.12(a) (emphasizing that medical professionals, to avoid liability, must uphold a level of care in accordance with “the standards of practice among members of the same health care profession with similar training and experience”).

CONCLUSION

After careful review, we hold that the trial court erred by instructing the jury on the sudden emergency doctrine. Because this error likely misled the jury, we reverse the underlying judgment and remand for a new trial.

NEW TRIAL.

Judges BRYANT and STEELMAN concur.

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appellate rules, counsel for the State was strongly admonished to strictly adhere to all applicable provisions of the North Carolina Rules of Appellate Procedure in the future. **State v. Foushee, 71.**

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Interlocutory orders and appeals—stay of declaratory judgment action—immediately appealable—A trial court's interlocutory order granting a stay of a declaratory judgment action concerning an insurer's duty to defend was immediately appealable. Whether an insurer has a duty to defend an underlying action affects a substantial right that might be lost absent immediate appeal. This opinion supercedes the previous opinion filed 4 March 2014. **Cinoman v. Univ. of N.C.**, 481.

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Notice of appeal—jurisdiction—The trial court did not err in a civil contempt proceeding by dismissing defendant's notice of appeal from a 50C no contact order. The court's jurisdiction over the case gave it authority to dismiss a filing in the case that defendant himself asserted was a nullity. **Tyll v. Berry**, 96.

Notice of appeal—not timely—An appeal was dismissed as untimely where the order from which plaintiff attempted to appeal was entered on 20 September 2013, a Friday, and plaintiff acknowledged in his notice of appeal that he received actual notice of the order by email on 25 September 2013, the following Wednesday. Plaintiff received actual notice within three days of entry of the order, excluding the intervening Saturday and Sunday, and had to file his notice of appeal within 30 days

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of entry of the order, or by 21 October. However, he did not file his notice of appeal until 25 October 2013. **Magazian v. Creagh, 511.**

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Preservation of issues—failure to argue—abuse of discretion—attorney fees—Although petitioners contended that the trial court erred by denying their motion for attorney fees, petitioners failed to argue on appeal that the trial court abused its discretion, and thus, any such argument was abandoned. Further, because petitioners' second and third arguments relied upon the success of their first, those arguments also failed. **High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 336.**

Preservation of issues—failure to cite authority—Although defendant contended that the trial court erred in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by allowing the prosecutor to read the younger victim's written statement to the jury, defendant waived this argument under N.C.R. App. P. 28(b)(6) by failing to cite any authority. **State v. Earls, 186.**

Preservation of issues—failure to cite authority—Although defendant contended that the trial court exceeded its authority in a civil contempt proceeding by imposing additional restrictions on defendant's contact with plaintiffs and others in the order, this issue was abandoned under N.C. R. App. P. 28(b)(6) since defendant cited no authority in support of his argument. **Tyll v. Berry, 96.**

Preservation of issues—failure to object—failure to argue plain error—Although defendant contended that the prosecutor improperly vouched for the younger victim's credibility by reading her statement to the jury in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case, he failed to preserve this issue by failing to object on this basis below and failing to argue plain error. **State v. Earls, 186.**

Preservation of issues—failure to object—failure to request special instructions—Where defendant neither objected to the trial court's jury instructions nor requested special instructions in a breach of contract, implied contract, and unjust enrichment case, its challenges to the court's instructions were not preserved for appellate review. **Geoscience Grp., Inc. v. Waters Constr. Co., Inc., 680.**

Preservation of issues—failure to object—quantum meruit—Defendant failed to object to the trial court's jury instructions submitting a claim based upon quantum meruit, and thus, that argument was not subject to appellate review. **Geoscience Grp., Inc. v. Waters Constr. Co., Inc., 680.**

Preservation of issues—failure to obtain ruling at trial court—false arrest—Although plaintiff contended the trial court erred in a wrongful death case by granting summary judgment in favor of defendants on plaintiff's claim of false arrest, plaintiff failed to preserve this issue based on failure to obtain a ruling at the trial court. **Mills v. Duke Univ., 380.**

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heard on appeal where the exact words were not used at trial, but the substance of the argument was sufficiently presented. **State v. Parks, 431.**

Preservation of issues—failure to raise issue at trial—discretionary decisions not subject to plain error review—Although defendant contended that the trial court erred in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by concluding that the younger victim was competent to testify, defendant never raised this issue below and discretionary decisions of the trial court are not subject to plain error review. **State v. Earls, 186.**

Preservation of issues—failure to seek ruling at trial—failure to attend hearing—failure to move for continuance—Although defendant contended that the trial court erred in a civil contempt proceeding by failing to consider his request for appointed counsel, the Court of Appeals did not need to determine whether defendant was entitled to counsel since defendant failed to seek a ruling from the trial court on his request for counsel, failed to attend the contempt hearing where he could have had his motion heard, and failed to move to continue the matter. **Tyll v. Berry, 96.**

Preservation of issues—issue not raised at trial—misinterpretation of statutory provisions—The merits of defendant's argument were reviewed on appeal notwithstanding his failure to object at trial where defendant contended that the trial court erred in its interpretation and application of statutory provisions. **State v. Jamison, 231.**

Preservation of issues—jurisdiction—waiver—The trial court properly asserted jurisdiction over a board of education, and the appeal was reviewed on the merits, where the board submitted to the jurisdiction of the trial court and waived its personal jurisdiction defense by failing to raise jurisdiction at the hearing and by arguing the merits of the case. **Tobe-Williams v. New Hanover Cnty. Bd. of Educ., 453.**

Preservation of issues—motion for judgment notwithstanding verdict—failure to identify issue—failure to cite authority—The court did not err by denying defendant's motion for judgment notwithstanding the verdict. Defendant failed to identify any issue or element for which the evidence was insufficient or cite any authority addressing the sufficiency of evidence of breach of contract or of recovery under quantum meruit. **Geoscience Grp., Inc. v. Waters Constr. Co., Inc., 680.**

Preservation of issues—waiver—involutionary recommitment—objection not raised at first hearing—The respondent in a case involving a ninety-day recommitment order waived his argument concerning subject matter jurisdiction and the facts alleged in the petition where his argument challenged the magistrate's determination to issue a custody order on those facts. Furthermore, respondent should have raised his concerns about the affidavit's sufficiency during his first involuntary commitment hearing. **In re Moore, 37.**

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Writ of certiorari—denial of counsel—granted—Defendant’s petition for writ of certiorari was allowed and the Court of Appeals addressed the merits of defendant’s argument that his constitutional right to assistance of counsel was violated when he was denied counsel at his resentencing hearing. **State v. Rouse, 92.**

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Inflicting serious bodily injury—evidence sufficient—definition given in charge—The trial court did not err by denying defendant’s motion to dismiss a charge of assault inflicting serious bodily injury where the evidence was sufficient to show that the victim suffered a serious bodily injury. Review was limited to the evidence presented at trial that supported the definition of serious bodily injury given to the jury. This evidence, particularly the victim’s ongoing trouble with her hand and eye, provided substantial evidence of a “permanent or protracted condition that causes extreme pain” and a “permanent or protracted loss or impairment of the functions of a bodily member or organ.” **State v. Jamison, 231.**

ASSOCIATIONS

Homeowners—standing—A homeowner’s association (ACO) in a complex that also included a commercial building, an office building, and a parking garage, had standing to bring a claim for monetary damages on behalf of its members where the service contract between the owner of the office building (SRS) and owner of the commercial building (ACH) harmed ACO by depriving it of payment for its services. Furthermore, ACO had standing pursuant to N.C.G.S. § 47C-3-102(a)(4) as ACO was defending matters affecting its condominiums. **SRS Arlington Offices 1, LLC v. Arlington Condo. Owners Ass’n, Inc., 541.**

Homeowners’ associations—amendment to restrictive covenants—unreasonable and unenforceable—The trial court erred in a case involving an Assessment Amendment to the Declaration of Covenants, Conditions, Easements and Restrictions (Declaration) of a residential community by granting partial summary judgment and awarding attorneys’ fees in favor of defendant. The Amendment disregarded the purpose of the Declaration’s original provisions and completely eliminated the benefits to builders. Thus, the amendment was unreasonable, invalid, and unenforceable. **Wallach v. Linville Owners Ass’n, Inc., 632.**

ATTORNEY FEES

Action against school board—not an agency—The trial court erred in an action against a school board by awarding plaintiff attorney fees under N.C.G.S. § 6-19.1, which allows attorney fees to a party prevailing over a state agency in a civil action. Defendant was not an agency for purposes of that statute. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 318.**

Award—not against public policy—The trial court’s award of fees and costs to an attorney in an attorney fees and costs dispute did not violate the public policy requiring that contingency fees be in writing as stated in Rule 1.5(c) of the Revised Rules of Professional Conduct of the North Carolina State Bar. The Rules, precedent from our Supreme Court, and decisions by previous panels of the Court of Appeals all reject the argument. **Robertson v. Steris Corp., 525.**

ATTORNEY FEES—Continued

Child support—sufficient means to defray cost of litigation—The trial court did not err by denying plaintiff attorneys fees in a child support case. The trial court's finding of fact that plaintiff had sufficient means to defray the cost of litigation was supported by the record. Furthermore, the trial court did not find as fact that defendant refused to provide support which was adequate under the circumstances. **Hinshaw v. Kuntz, 502.**

Claim for fees in quantum meruit—subject matter jurisdiction—personal jurisdiction—jurisdiction over settlement—The trial court did not err in an attorney fees and costs dispute by conducting a hearing on the attorney's claims. The trial court had subject matter jurisdiction, personal jurisdiction over plaintiffs, and jurisdiction over plaintiffs' settlement funds. Moreover, the attorney was not required to bring his claims for fees and costs against plaintiffs in a separate action because an attorney may properly bring a claim for fees in quantum meruit against a former client by the filing of a motion in the underlying action to be resolved by the trial court via a bench trial. **Robertson v. Steris Corp., 525.**

Fraud—unfair trade practices—acts occurring within partnership—no in or affecting commerce—The trial court erred in part in a fraud and unfair trade practices case by awarding attorney fees based on its conclusion that defendants' acts were "in or affecting commerce" in North Carolina. Because the alleged misconduct of certain defendants occurred within a partnership or joint enterprise, it was not "in or affecting commerce" for the purposes of an unfair and deceptive trade practices action. Accordingly, the trial court erred in awarding attorney fees as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court did not err by awarding attorney's fees with regard to an independent contractor. Further, because the trial court concluded that an individual defendant was individually liable for the torts committed by the independent contractor under a veil-piercing theory, that individual was subject to the same attorney's fees to which the independent contractor was subject. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

Motion to intervene—not required—motion in the cause sufficient—The trial court did not err in an attorney fees and costs dispute in its handling of the attorney's motion to intervene in the underlying case. A dismissed attorney seeking legal representation fees and costs can pursue his claims against his former clients by the filing of a motion in the cause. Accordingly, both the motion to intervene and the allowance of that motion in this case were wholly unnecessary to permit the judge to reach and resolve the merits of the attorney's motion in the cause. **Robertson v. Steris Corp., 525.**

ATTORNEYS

Sanctions—discovery violation—no abuse of discretion—The trial court did not abuse its discretion in determining the sanction to impose upon the attorney involved in an attorney fees and costs dispute for his actions during discovery. Finding of fact 46 contained an entirely sufficient explanation of the court's decision to sanction the attorney. **Robertson v. Steris Corp., 525.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Instructions—failure to charge on first-degree trespass—Defendants did not demonstrate that the trial court's failure to instruct the jury regarding first-degree trespass in a burglary and breaking or entering prosecution was error, much less

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

plain error, where the evidence did not permit a reasonable inference disputing the State's contention that defendants intended to commit a felony. **State v. Lucas, 247.**

Insufficient evidence—intent to commit larceny therein—The trial court erred by denying defendant's motion to dismiss the charge of felony breaking or entering a place of worship because there was insufficient evidence of his intent to commit larceny therein. However, there was ample evidence to support a conviction for misdemeanor breaking or entering and the case was remanded for entry of judgment on that offense and resentencing. **State v. Campbell, 551.**

Motor vehicle—intent to steal vehicle—no intent to steal contents—The trial court did not err by denying defendant's motion to dismiss a charge of breaking or entering a motor vehicle where defendant argued that there was intent to steal the vehicle, but no intent to steal anything inside the vehicle. Defendant's argument, however, was rejected in *State v. Clark*, 208 N.C. App. 388. **State v. Mitchell, 423.**

Motor vehicle—jury instructions—disjunctive—The trial court did not commit reversible error by instructing the jury on a theory of breaking *or* entering a motor vehicle when the indictment alleged that defendant broke *and* entered the vehicle. **State v. Mitchell, 423.**

Second-degree—evidence of entry—insufficient—Defendants' convictions for second-degree burglary were vacated where the evidence failed to raise more than a mere suspicion or conjecture that defendants entered the home. **State v. Lucas, 247.**

Second-degree—insufficient evidence of entry—sufficient evidence of intent—felonious breaking or entering—A conviction for second-degree burglary was remanded for entry of judgment on felonious breaking or entering where there was insufficient evidence of entry into the home but sufficient evidence of defendants' intent to commit a felony. The State's failure to prove that either defendant actually entered the home, in no way detracted from the sufficiency of the evidence of defendants' intent to commit a felony within the residence. **State v. Lucas, 247.**

Sufficiency of evidence—breakings—There was sufficient evidence of a breaking presented at trial to withstand a motion to dismiss on the charge of first-degree burglary where the uncontroverted testimony at trial established that the screen door was closed and that the victim was attempting to close the front door when defendant forced his way into the home. **State v. Jamison, 231.**

State's burden of proof—either breaking or entering—acting in concert—The State's burden of proof in a prosecution for breaking or entering a motor vehicle is satisfied by evidence of *either* a breaking *or* an entering. Where the trial court instructs the jury on the acting in concert doctrine, the State's burden as to the element of breaking can be satisfied by showing either that defendant personally committed the breaking or that he acted in concert with someone to commit the breaking. **State v. Mitchell, 423.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Felony child abuse by sexual act—vaginal intercourse—The trial court did not err by denying defendant's motion to dismiss the charge of felony child abuse by a sexual act based on vaginal intercourse. Contrary to defendant's assertion, the General Assembly intended the term "sexual act," as it is used in N.C.G.S. § 14-318.4(a2) of Article 39, to include vaginal intercourse. **State v. McClamb, 753.**

CHILD CUSTODY AND SUPPORT

Actual income—bonus income—calculated as part of base income—The trial court erred in excluding the parties' bonus income when calculating the parties' actual income and the overall child support award. The North Carolina Child Support Guidelines include bonus income in the definition of income, and because the bonus income was not irregular or non-recurring, the trial court was required to include the bonus income in calculating the parties' base income and the overall child support award. **Hinshaw v. Kuntz, 502.**

Proposed relocation—modification of custody—no abuse of discretion—The trial court did not abuse its discretion in a child custody action by modifying the existing order so that defendant would have school year custody if plaintiff moved to Oregon. Although plaintiff's interpretation of the evidence was different, she did not demonstrate how the trial court abused its discretion in reaching its result. **Green v. Kelischek, 1.**

Remarriage and relocation—change of circumstances—Even if plaintiff's arguments had been properly preserved for appeal, the trial court did not err by finding a substantial change of circumstances in plaintiff's remarriage and proposed relocation. The trial court did not rely on plaintiff's remarriage alone in invoking its authority to modify the existing order and did not abandon its responsibility to link individual changes in circumstance to the child's welfare. **Green v. Kelischek, 1.**

Remarriage and relocation—salutary effects of move—considered by trial court—The trial in a child custody action considered the salutary effects of plaintiff's proposed move, contrary to plaintiff's contention. **Green v. Kelischek, 1.**

Retroactive child support—valid, unincorporated separation agreement—no evidence of actual amounts expended—The trial court did not err in a child support case by failing to award retroactive child support from 1 September 2010 through the time plaintiff filed her complaint in district court. The trial court lacked authority to award retroactive child support because defendant, at all requisite times, abided by the terms of the parties' valid, unincorporated separation agreement. Even if the trial court had had the authority, plaintiff failed to present evidence regarding the specific amounts she actually expended to support the minor children during the requisite period for which she sought retroactive child support. **Hinshaw v. Kuntz, 502.**

CIVIL RIGHTS

§ 1983—development of land—failure to exhaust administrative remedies—sovereign immunity—statute of limitations—The trial court erred by dismissing plaintiffs' claims under 42 U.S.C. § 1983 because these claims were not barred by state law sovereign immunity or failure to exhaust administrative remedies. Defendants did not preserve a statute of limitations issue for appeal because they did not argue the statute of limitations at the motion hearing and it was not clear that they obtained a ruling on the issue. **Swan Beach Corolla, L.L.C. v. Cnty. of Currituck, 617.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Multiple independent grounds for judgment—preclusive effect as to each issue—The Industrial Commission did not err in a Tort Claims Act case by granting summary judgment in favor of defendant on the grounds of immunity and the public

COLLATERAL ESTOPPEL AND RES JUDICATA—Continued

duty doctrine based on collateral estoppel. Where a trial court bases its judgment on multiple independent grounds, each of which have been fully litigated, and that judgment has not been appealed, the trial court's determination as to every issue actually decided has preclusive effect in later litigation. **Propst v. N.C. Dep't of Health & Human Servs.**, 165.

COMPROMISE AND SETTLEMENT

Subsequent claim—different basis—A settlement agreement between a homeowner's association (ACO) and the owner of an office building (SRS) in a complex that also included a commercial building and a parking garage did not bar subsequent claims against the owner of the commercial building (ACH) under election of remedies. ACO sought consistent remedies, based on quantum meruit, to force all parties to disgorge ill-gotten profits, not compensatory damages. **SRS Arlington Offices 1, LLC v. Arlington Condo. Owners Ass'n, Inc.**, 541.

CONFESSIONS AND INCRIMINATING STATEMENTS

Spontaneous statement—not custodial interrogation—The trial court did not err in an assault case by denying defendant's motion to suppress his statement to police. Defendant's statements in response to questions posed to the victim were spontaneous and not the result of custodial interrogation. Therefore, defendant was not subjected to custodial interrogation without the benefit of *Miranda* warnings. **State v. Hogan**, 218.

To law enforcement officers—voluntary—The trial court did not err in a sexual offenses with a child case by denying defendant's motion to suppress statements made by him to law enforcement officers. The unchallenged findings of fact were sufficient to conclude that defendant's statements were voluntary. **State v. McCanless**, 260.

CONSTITUTIONAL LAW

Assistance of counsel—resentencing—hearing—The trial court erred by denying defendant the assistance of counsel at his resentencing hearing. The trial court's judgments were vacated and the matter was remanded for resentencing. **State v. Rouse**, 92.

Due process—homeless person—sex offender—failure to report change of address—statute not void for vagueness—The trial court did not err by denying defendant's motion to dismiss a charge under N.C.G.S. § 14-208.11 for failing to report a change of address as a sex offender even though defendant contended that the statute was so vague that it violated due process. The fact that it may sometimes be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses. **State v. McFarland**, 274.

Due process—quoting Bible during sentencing—The trial court did not violate defendant's right to due process by quoting the Bible during sentencing. While the trial court should not have referenced the Bible or divine judgment in sentencing, defendant cannot show that his rights were prejudiced in any way or that his sentence was based on the trial court's religious invocation. **State v. Earls**, 186.

CONSTITUTIONAL LAW—Continued

Effective assistance of counsel—claim dismissed without prejudice—Defendant's contentions in a drugs case concerning ineffective assistance of counsel were dismissed without prejudice since the record did not conclusively demonstrate whether defendant received ineffective assistance of counsel. **State v. Satterthwaite, 440.**

Effective assistance of counsel—failure to move to exclude evidence—not prejudicial—Defendant's argument that he received ineffective assistance of counsel in a larceny and breaking or entering a place of religious worship case was overruled. Although trial counsel failed to move in limine to exclude evidence that defendant had been arrested on an unrelated breaking or entering charge and initially failed to object to introduction of that evidence at trial, there was insufficient evidence of defendant's intent to commit larceny therein and defendant could not show prejudice from any failure of his trial counsel to object to this evidence. **State v. Campbell, 551.**

Effective assistance of counsel—failure to object—Defendant did not receive ineffective assistance of counsel based on defense counsel's failure to object to the introduction of a videotaped interview of a minor victim in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case. Out-of-court statements offered to corroborate a child's testimony regarding sexual abuse have been held to be non-hearsay and thus admissible. **State v. Earls, 186.**

Effective assistance of counsel—failure to request instructions—Defense counsel's failure to request a jury instruction defining larceny and an instruction on first-degree trespass did not constitute ineffective assistance of counsel in a prosecution for second-degree burglary. It was determined elsewhere in the opinion that the trial court did not commit plain error in its instructions to the jury. **State v. Lucas, 247.**

Public trial—indecent liberties—courtroom closed during victim's testimony—Defendant's constitutional right to a public trial was not violated in an indecent liberties prosecution where the courtroom was closed during the victim's testimony. While the trial court's findings of fact were not supported by competent evidence in its original order, the trial court reevaluated the State's motion to close the courtroom pursuant to remand instructions and made numerous supplemental findings regarding such things as the nature of the charges, the young age of the victim, the judge's experience in that courthouse and the lack of alternatives. Those findings were sufficient to support the courtroom closure. **State v. Godley, 562.**

CONTEMPT

Civil—findings of fact—sufficiency of evidence—The trial court did not err by finding in its civil contempt order that Sharon Tyll was a member of plaintiffs' family protected by a 50C no contact order, the 50C order prohibited defendant from simply "contacting" plaintiffs or their family, and defendant continued to harass and interfere with plaintiffs through electronic means following entry of the 50C order. The findings were supported by sufficient evidence. **Tyll v. Berry, 96.**

COSTS

Bookkeeping fees—testimony of court-appointed accountant—authority of trial court—The trial court did not err in a fraud and unfair trade practices case by

COSTS—Continued

awarding bookkeeping fees, relying on the testimony of a court-appointed accountant in setting those fees, and denying defendants the opportunity to rebut that accountant's testimony. The trial court had the authority to appoint an accountant to perform a forensic accounting of the entities and to assess the fees for the expert. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

Forensic accountants fees—recoverable by plaintiffs—The trial court did not err in a fraud and unfair trade practices case by ruling that the fees of the forensic accountants ordered to examine defendants' books were costs recoverable by plaintiffs. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

CRIMINAL LAW

Instructions—eyewitness identification—The trial court did not err in a prosecution for armed robbery and other offenses by refusing to give defendant's requested instruction on eyewitness identification evidence. The instruction that defendant requested bore a strong resemblance to the New Jersey instruction developed as a result of *State v. Henderson*, 208 N.J. 208, which contained numerous factual statements about the impact of weapons, focus, stress, racial differences, and the degree of certainty expressed by the witness. Given that there was no such evidence in the present did not err by declining to deliver defendant's requested instruction. **State v. Watlington, 580.**

Post-conviction proceedings—motion for DNA testing—no newer and more accurate tests—The trial court did not err by denying defendant's motion for post-conviction DNA testing under N.C.G.S. § 15A-269. Defendant failed to adequately establish that newer and more accurate tests would identify the perpetrator or contradict prior test results. **State v. Collins, 398.**

Prostitution of minor—evidence not sufficient—corpus delicti rule—The record in a prosecution for participating in the prostitution of a minor was insufficient where the State erroneously relied solely on defendant's extrajudicial statement to prove his guilt, without providing other corroborating evidence. Although the two victims gave several differing accounts of events, both testified at trial that defendant did not solicit sex from them in exchange for money or marijuana. Furthermore, defendant's extrajudicial statement regarding an alleged exchange of sex for money or marijuana was vague. **State v. Parks, 431.**

State's closing argument—improper—new trial not required—The trial court did not commit reversible error by overruling defendant's objections to the State's closing argument. The remarks by the State about a rifle used by an accomplice were improper and should have been precluded by the trial court, but did not require a new trial. **State v. Watlington, 601.**

DAMAGES AND REMEDIES

Basis—unjust enrichment—not compensatory—Although the owner of a commercial building (ACH) contended the trial court erred by granting summary judgment on claims for monetary relief by a homeowners association (ACO) because ACO was not a party to the services agreement or parking deck lease between the owners of an office building (SRS) and ACH and could not demonstrate damages, the monetary relief granted by the trial court was based on restitution for unjust enrichment rather than on compensatory damages. **SRS Arlington Offices 1, LLC v. Arlington Condo. Owners Ass'n, Inc., 541.**

DAMAGES AND REMEDIES—Continued

Punitive—waiver of claim—A homeowners association (ACO) waived its claim for punitive damages by clearly stating to the trial court several times that it was not asking for punitive damages and acknowledging that it lacked sufficient evidence to bring a claim for punitive damages. **SRS Arlington Offices 1, LLC v. Arlington Condo. Owners Ass'n, Inc.**, 541.

Restitution—evidence not sufficient to support award—Restitution orders were remanded where defendants contended that the evidence was not sufficient evidence to support the award and the State conceded error. **State v. Lucas**, 247.

Restitution—sufficiency of evidence—The trial court erred in a common law robbery case by ordering restitution without sufficient evidence. The sentence of restitution was vacated and the case was remanded for a new sentencing hearing on this sole issue. **State v. Talbot**, 297.

DECLARATORY JUDGMENTS

Determination of insurance coverage—actual case or controversy—The trial court erred by staying a declaratory judgment action based on its determination that no actual controversy existed as to the duty of the University of North Carolina Liability Insurance Trust Fund (UNC LITF) to indemnify until the underlying malpractice action was finally resolved. While the UNC-LITF policy by its terms is primary, the policy is also pro rata, so that UNC-LITF and the doctor's private insurance provider (MMIC) would provide concurrent coverage if the MMIC policy is pro rata, and UNC-LITF would be primary if the MMIC policy contains an excess clause. Therefore, an actual controversy exists as to the UNC LITF's duty to indemnify. This opinion supersedes the previous opinion filed 4 March 2014. **Cinoman v. Univ. of N.C.**, 481.

DISCOVERY

Violations—misapprehension of law—The trial court erred by dismissing two counts of obtaining property by false pretenses based on a misapprehension of law concerning the extent to which a discovery violation actually occurred. The trial court's order was reversed and remanded. **State v. Foushee**, 71.

DOMESTIC VIOLENCE

Ex parte protective order—findings of fact—pre-printed form—minimally sufficient—The trial court did not err by entering an ex parte domestic violence protective order (DVPO) against defendant. The court's findings of fact marked on a pre-printed form were minimally sufficient to support its conclusions that defendant committed acts of domestic violence against plaintiff and that it clearly appeared that there was a danger of acts of domestic violence against plaintiff. The trial court's failure to mark the first box of Finding 2 was merely a clerical error. **Rudder v. Rudder**, 173.

Findings—children's statements—specificity about dates—Plaintiff's inability to be specific about certain dates was not fatal to the findings in a Domestic Violence Prevention Order. Young children cannot be expected to be exact regarding times and dates, and a child's uncertainty as to time or date goes to the weight rather than the admissibility of the evidence. **Henderson v. Henderson**, 129.

DOMESTIC VIOLENCE—Continued

Findings—statements made during investigation—In a hearing on a Domestic Violence Prevention Order, the evidence justified the trial court's findings of fact even though certain statements by the children were made in the context of DSS's investigation. The mere existence of a DSS investigation did not mean that domestic violence had occurred. **Henderson v. Henderson, 129.**

Jurisdiction—stated purpose of hearing—The trial court did not exceed its jurisdiction entering a Domestic Violence Protective Order (DVPO) where defendant asserted that the hearing was not held in accordance with the notice he received, which stated that the purpose of the hearing was to determine whether the ex parte order should be continued. A hearing to determine whether to continue the trial court's ex parte order must be a hearing to determine whether the trial court's protective order should be continued beyond the temporary time frame of the ex parte DVPO. **Henderson v. Henderson, 129.**

One-year protective order—ex parte order expired—court lacked authority—The trial court erred by entering a one-year domestic violence protection order (DVPO) after an ex parte DVPO had been in effect for more than 18 months, but then expired without being renewed. The trial court did not have authority to enter the one-year DVPO that was based upon the same complaint as the ex parte DVPO. **Rudder v. Rudder, 173.**

Time to file answer—up to ten days rather than full ten days—The trial did not exceed its jurisdiction in holding a hearing on a Domestic Violence Prevention Order (DVPO) because defendant was deprived of a full 10 days to file his answer. N.C.G.S. § 50B-2(c) states unequivocally that a hearing on an ex parte DVPO must be held “within 10 days” of the issuance of the DVPO or “within seven days” of the date of service of process, whichever is later. The statute gives defendant no more than 10 days to answer, not the absolute right to a full 10 day; moreover, defendant was permitted to appear and testify despite the fact that he had not filed an answer. **Henderson v. Henderson, 129.**

Violating a protective order with deadly weapon—jury instructions—violating a protective order—The trial court committed plain error in a violating a domestic violence protective order (“DVPO”) case. Because the trial court concluded that the knife used in this case was not a deadly weapon per se, the trial court should have instructed the jury on the lesser-included misdemeanor offense of violating a DVPO. Failing to instruct the jury on the lesser-included misdemeanor offense likely affected the outcome in the case. **State v. Edgerton, 412.**

DRUGS

Possession of drug paraphernalia—motion to dismiss—sufficiency of evidence—plastic baggies—The trial court erred by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. The indictment alleged possession of plastic baggies as drug paraphernalia, and the State did not present evidence of plastic baggies. **State v. Satterthwaite, 440.**

EVIDENCE

Admission of anime images—overwhelming evidence of guilt—no reasonable possibility of different result—The trial court did not commit prejudicial error in a sexual offenses with a child case by admitting evidence of seven anime images

EVIDENCE—Continued

taken from defendant's computer. Even assuming *arguendo* that the trial court erred in admitting the images, given the overwhelming evidence of defendant's guilt, no reasonable possibility existed that a different result would have been reached at trial absent the admission of the anime images. **State v. McCanness, 260.**

Authentication—handwriting—self-authenticating affidavit—comparison to buy ticket—The trial court did not commit error or plain error in a possession of a firearm by a felon case by allowing the signature on defendant's affidavit of identity to be compared to the signature on the buy ticket for a firearm sold to a pawn shop. Defendant's affidavit was a self-authenticating document pursuant to N.C.G.S. § 8C-1, Rule 902, and there was enough similarity between the signature on the affidavit and the signature on the buy ticket that the jury could reasonably infer that the signature on the buy ticket was genuine. **State v. McCoy, 268.**

Authentication—photographs of text messages—testimony—sufficient—The trial court did not err in a conspiracy to commit robbery with a dangerous weapon case by allowing the State to introduce into evidence photographs of text messages taken from an alleged co-conspirator's cell phone. Testimony from the detective who recovered the text messages from the phone and testimony from the person the co-conspirator was communicating with in the text messages was sufficient to authenticate the exhibit. **State v. Gray, 197.**

Opinion testimony of detective—interpretation of text messages—no plain error—The trial court did not plainly err in a conspiracy to commit robbery with a dangerous weapon case by allowing testimony of a detective concerning his opinions, decisions, observations, and interpretation of text messages. Regardless of whether the admission of the testimony was error, given the overwhelming and uncontroverted evidence of defendant's guilt, the alleged error did not amount to plain error requiring a new trial. **State v. Gray, 197.**

Outside of scope—damages—excluded—Where defendants sought to introduce evidence that was outside of the scope of the hearing on damages in a fraud and unfair trade practices case, the trial court did not abuse its discretion in excluding this evidence. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

Testimony—juvenile's defiant expression—relevancy—The trial court did not err by allowing a witness to characterize a juvenile's expression as "defiant" and alternatively, by denying his motion to dismiss the petition for misdemeanor assault. Because this testimony stemmed from the witness's personal experience combined with her observation of the juvenile, it was admissible to shed light upon the circumstances surrounding the alleged incident, and thus, was relevant and admissible. Further, there was sufficient evidence to determine that the juvenile's actions were intentional. **In re M.J.G., 350.**

Testimony—minor child sex abuse victim—leading questions—fair opportunity to cross-examine—The trial court did not err in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by allowing the prosecution to ask the 14-year-old victim leading questions, nor did it violate defendant's rights under the Sixth and Fourteenth Amendments. Leading questions were necessary to develop the witness's testimony. Further, the victim testified in open court and defendant had a full and fair opportunity to cross-examine her. **State v. Earls, 186.**

EVIDENCE—Continued

Text messages—not prejudicial—Defendant's contention that the trial court erred by sustaining the State's objections to the admission of evidence concerning the contents of certain text messages was overruled. Assuming without deciding that the text messages were properly authenticated and were relevant, there was no reasonable possibility that the outcome would have been different otherwise. **State v. Watlington, 580.**

Video—photographs—jury instruction—The trial court did not err in a common law robbery case by failing to instruct the jury in accordance with N.C.P.I.-Criminal 104.50. While the trial court did not clarify which portion of the instruction as given applied to the video or to the other photos, it hardly seemed likely that the jury failed to understand the distinction. **State v. Talbot, 297.**

FIDUCIARY RELATIONSHIP

Breach of duty—constructive fraud—unchallenged findings of fact—The trial court did not err by finding that defendants breached a fiduciary duty and engaged in constructive fraud. Defendants did not challenge the trial court's relevant findings and the findings supported the conclusion that defendants breached their fiduciary duty and engaged in constructive fraud. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

FIREARMS AND OTHER WEAPONS

Possession of by felon—jury instructions—prior conviction—not plain error—Although the trial court erroneously instructed the jury in a possession of a firearm by a felon case that defendant had previously been convicted of the same crime, in light of the evidence of defendant's guilt, the trial court's statement did not have a probable impact on the jury's finding that the defendant was guilty. **State v. McCoy, 268.**

Possession of by felon—sufficient evidence of possession—The trial court did not err in a possession of a firearm by a felon case by denying defendant's motion to dismiss. The State presented sufficient evidence from which the jury could conclude that defendant actively possessed the gun which was sold to the pawn shop. **State v. McCoy, 268.**

FRAUD

Unfair trade practices—depreciation of value of property—The trial court did not err in a fraud and unfair trade practices case by holding defendants liable for the depreciation in value of certain property where there was evidence that defendants were responsible for depreciation in value of that property. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

HOMICIDE

Jury instructions—omission of involuntary manslaughter instruction—not prejudicial—The trial court did not commit plain error in a murder case by omitting an instruction on involuntary manslaughter. In finding defendant guilty of second-degree murder, the jury necessarily found beyond a reasonable doubt that defendant acted with malice, rejecting the absence of malice necessary for involuntary

HOMICIDE—Continued

man slaughter. Thus, it could not be said that had the jury been instructed on involuntary manslaughter, the jury would have reached a different verdict. **State v. Gurkin, 207.**

Jury instructions—self-defense—imperfect self-defense—no evidence to support either instruction—The trial court properly denied defendant's requested instructions on self-defense and imperfect self-defense in a murder case. The evidence taken in the light most favorable to defendant failed to show any circumstances that would suggest that defendant reasonably believed it was necessary or reasonably necessary for him to kill his wife in order to avoid death or great bodily harm. **State v. Gurkin, 207.**

IMMUNITY

Public official immunity—campus police officers—Campus police officers are entitled to public official immunity for their acts in furtherance of their official duties so long as those acts were not corrupt, malicious, or outside of and beyond the scope of their duties. **Mills v. Duke Univ., 380.**

Sovereign—allegation of valid contract—sufficient to waive defense—The trial court did not err by denying defendants' motion to dismiss plaintiffs' claim for breach of contract pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2). Plaintiffs sufficiently alleged a valid contract between themselves and the State in their complaint to waive the defense of sovereign immunity. **Lake v. State Health Plan for Teachers & State Emps., 368.**

Sovereign immunity—waiver—lease agreements—breach of contract—declaratory judgment—The trial court did not err by denying defendants' motion to dismiss both the breach of contract claim and the claim for declaratory relief. Plaintiff sufficiently pled waiver of defendants' sovereign immunity. Defendants impliedly waived their sovereign immunity by entering into the lease agreements with plaintiff. The State waives its sovereign immunity when it enters into a contract with a private party, and not when it engages in conduct that may or may not constitute a breach. **Can Am S., LLC v. State of N.C., 119.**

INDECENT LIBERTIES

Substantial evidence—arousing or gratifying sexual desire—Defendant also argues that the trial court erred in denying his motion to dismiss the charge of indecent liberties with a child. Specifically, defendant contends that the State failed to demonstrate sufficient substantial evidence that he committed indecent liberties for the purpose of arousing or gratifying sexual desire. Testimony from the State's witnesses coupled with the other instances of defendant's alleged sexual misconduct that gave rise to the first-degree rape charges are sufficient evidence to infer defendant's purpose of arousing or gratifying sexual desire. **State v. Godley, 562.**

With student—bill of particulars—instructions—The trial court did not err in a prosecution for indecent liberties with a student by not instructing the jury on the actus reus of each charge according to the amended bills of particulars filed by the State. The victim's testimony included numerous acts, any one of which could have served as the basis for the offenses, and the amended bills of particulars reflected his testimony. **State v. Stephens, 292.**

INDECENT LIBERTIES—Continued

With student—definition of enrollment—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a prosecution for indecent liberties with a student where defendant contended that the victim was not enrolled during the summer when the incidents took place. There was evidence from the school principal and the victim's mother that the victim remained enrolled during the summer, even though the academic year was over. **State v. Stephens, 292.**

INDICTMENT AND INFORMATION

Larceny—fatally flawed—failure to allege entity capable of property ownership—Defendant's conviction for larceny was vacated where the indictment was fatally flawed because it failed to allege that Manna Baptist Church was an entity capable of owning property. Where an indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment. **State v. Campbell, 551.**

INSURANCE

Uninsured motorist—insurer a separate party—service required—The trial court did not err in an action arising from a car accident in its determination that defendant Integon was required to be served with a copy of the complaint and summons to be made a party to the action. N.C.G.S. § 20-279.21(b)(3)a establishes that the insurer is a separate party to the action between the insured plaintiff and an uninsured motorist. **Kahihu v. Brunson, 142.**

JURISDICTION

Personal—general appearance by attorney—waiver of right to challenge personal jurisdiction—An attorney's representation constituted a general appearance submitting defendant Margie Verbal to the jurisdiction of the court and she, therefore, waived her right to challenge the trial court's exercise of personal jurisdiction. **Brewster v. Verbal, 668.**

Standing—not an aggrieved person—The trial court did not err by dismissing plaintiff's appeal and action for declaratory judgment based on lack of standing. Plaintiff provided no factual basis to support the argument that he was an aggrieved person. **Cox v. Town of Oriental, 675.**

Subject matter—order—post-conviction DNA testing—entered out of session—without consent of parties—The trial court did not lack subject matter jurisdiction to enter an order denying defendant's motion for post-conviction DNA testing. Pursuant to N.C.G.S. § 7A-47.1, a trial court may exercise in chambers jurisdiction in a nonjury matter arising in his or her district to enter an order out of session and without the consent of the parties. **State v. Collins, 398.**

Subject matter—venue—satellite-based monitoring hearing—Defendant's argument in a satellite-based monitoring (SBM) case that the trial court lacked subject matter jurisdiction over him because the State failed to present any evidence that he was a resident of the county in which the hearing was held was dismissed under *State v. Mills*, 754 S.E.2d 674 (2014). The requirement that the SBM hearing be held in the county in which defendant resided related to venue, not subject matter jurisdiction, and defendant's failure to raise the issue before the trial court waived his ability to raise it for the first time on appeal. **State v. Jones, 239.**

JURY

Alleged misconduct—judicial inquiry into conduct—no abuse of discretion—The trial court did not abuse its discretion in a homicide case by declining to inquire into alleged improper discussions by prospective jurors. The trial court acted within its discretion in declining to conduct any further inquiry into the alleged improper discussions of prospective jurors and limiting the scope of its inquiry. **State v. Gurkin, 207.**

Deliberations—playing surveillance video twice—not an expression of opinion by trial court—The trial court did not err in a common law robbery case by replaying a surveillance video twice during jury deliberations. Merely playing a moving picture (video) of an event which did not contain any audio, so that the jurors would have an ample opportunity to review this evidence without having to ask to see the tape again later, did not constitute error nor did such an action by the trial court express any opinion. Jurors are presumed to follow jury instructions and curative instructions, including the one given in this case that jurors should not think the judge had any opinion. **State v. Talbot, 297.**

Selection procedures—deviation from statutory procedure—no prejudice shown—The trial court did not plainly err in a homicide case by deviating from the statutory procedure governed by N.C.G.S. § 15A-1214 for passing jurors to defendant during jury selection. Although it was undisputed that the trial court violated the statutorily mandated procedure, defendant failed to show prejudice such as jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, nor any other defect which had the likelihood to affect the outcome of the trial. Furthermore, the deviation from the statutory procedure in this case did not constitute reversible error *per se*. **State v. Gurkin, 207.**

Unanimous verdict—Allen charge—substantial compliance with statute—The trial court did not commit plain error in a felonious breaking or entering and assault inflicting serious bodily injury case by failing to properly instruct the jury of its duty to make reasonable efforts to reach a unanimous verdict. Although the trial court's *Allen* charge failed to state the words of N.C.G.S. § 15A-1235(b)(3) verbatim, the charge was in substantial compliance with N.C.G.S. § 15A-1235. **State v. Massenburg, 609.**

JUVENILES

Delinquency—disorderly conduct—The trial court did not err by denying a juvenile's motion to dismiss a petition for disorderly conduct. The facts of the case, viewed in the light most favorable to the State, demonstrated that the juvenile's conduct caused a substantial interference with, disruption of, and confusion of the operation of the school. **In re M.J.G., 350.**

Delinquency—misdemeanor assault—The trial court did not err by failing to find that the juvenile was delinquent of the offense of misdemeanor assault beyond a reasonable doubt. The court relied on the petition that sufficiently alleged the juvenile committed simple assault by forcefully hitting the victim in her shoulder, breast, and chest area with his shoulder, causing the victim to move back a few steps. **In re M.J.G., 350.**

Disposition hearing—terms—failure to cite authority—harmless error—failure to object—The trial court did not err by holding an alleged sham disposition hearing and allegedly violating the statutory mandate to allow the juvenile's

JUVENILES—Continued

parents to present evidence. The juvenile failed to cite to any authority to support his assumption of a sham hearing. Assuming *arguendo* that the trial court decided the terms of his disposition prior to allowing the juvenile's mother to be heard, any error was harmless based on the fact that the mother did not object to the condition of attending the family classes but effectively agreed with the trial court. **In re M.J.G., 350.**

LARCENY

Instructions—failure to define—no plain error—Although defendants contended that the trial court committed plain error by failing to define larceny to the jury, given that the State's case identified larceny as the specific felony that defendants intended to commit, the jury did not need a formal definition of the term larceny. There was evidence permitting the inference that defendants intended to steal property and there was no evidence suggesting that defendants intended to merely borrow the property. **State v. Lucas, 247.**

MEDICAL MALPRACTICE

Expert testimony—affidavit—standard of care—The trial court erred in a medical malpractice case by granting summary judgment in favor of defendant doctors. Plaintiffs forecasted sufficient evidence to satisfy the requirements of N.C.G.S. § 90-21.12(a). Further, the trial court erred by applying the holding in *Wachovia Mortgage Co.*, 30 N.C. App. 1, to a doctor's affidavit regarding the applicable standard of care. The case was remanded to the trial court for further proceedings. **Peter v. Vullo, 150.**

Loss of consortium—summary judgment improperly granted—The trial court erred in a medical malpractice case by granting summary judgment in favor of defendants on plaintiff husband's loss of consortium claim. Because summary judgment was erroneously entered as to plaintiffs' claims of negligence, the loss of consortium claim, which was derivative of the negligence claim, should have survived a motion for summary judgment. **Peter v. Vullo, 150.**

Medical negligence—sudden emergency doctrine inapplicable—The trial court erred by instructing the jury on the sudden emergency doctrine because the doctrine is not applicable in medical negligence actions and was therefore misleading and likely affected the outcome of the trial. **Wiggins & Small v. E. Carolina Health-Chowan, 759.**

MENTAL ILLNESS

Findings—evidentiary—recital of doctor's testimony—In an involuntary commitment proceeding, the trial court did not err by making a challenged evidentiary finding of fact even though it was reciting some of a doctor's testimony because the trial court went on to find the ultimate facts that defendant was mentally ill and a danger to himself and others. **In re Moore, 37.**

Involuntary commitment—findings—defendant a threat to himself—The trial court in an involuntary commitment proceeding properly found that respondent was a danger to himself because of a reasonable possibility that defendant would suffer serious physical debilitation in the near future. While the trial court made findings about defendant's past conduct, the trial court also made finding about respondent's likely future conduct. **In re Moore, 37.**

MOTOR VEHICLES

Driving while impaired—multiple chemical analysis tests—implied consent rights—The trial court did not err in a driving while impaired case by granting defendant's motion to suppress the results of a chemical blood test. Where the State seeks to administer multiple chemical analysis tests to a defendant suspected of driving while impaired, the State must advise the defendant of his implied consent rights prior to the administration of each new test pursuant to N.C.G.S. § 20-16.2(a). **State v. Williams, 445.**

Misdemeanor death by motor vehicle—involuntary manslaughter—bail bondsmen—not authorized to violate motor vehicle laws based on status—The trial court did not err in an involuntary manslaughter and misdemeanor death by motor vehicle case by instructing the jury that bail bondsmen cannot violate North Carolina motor vehicle laws in order to make an arrest. Defendant bail bondsman was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status. The trial court's instruction to the jury did not lessen the State's burden of showing that defendant's violation of North Carolina motor vehicle laws was intentional, willful, wanton, or reckless. **State v. McGee, 285.**

NEGLIGENCE

Summary judgment—genuine issue of material fact—The trial court erred in a negligence case arising out of injuries the 86-year-old plaintiff sustained when she fell from a rolling chair during a visit to her eye doctor by granting defendant's motion for summary judgment. There were genuine issues of material fact concerning whether defendant was negligent in causing plaintiff's injuries and whether plaintiff was negligent in contributing to her injuries. **Sims v. Graystone Ophthalmology Assocs., P.A., 65.**

PARTIES

Joinder—necessary—proper—amendment to restrictive covenants—The trial court did not err in a case involving amendments to the Declaration of Covenants, Conditions, Easements and Restrictions of a residential community by denying defendant's motion to dismiss for failure to join the necessary parties. The parties defendant alleged needed to be joined were proper but not necessary. **Wallach v. Linville Owners Ass'n, Inc., 632.**

Joinder—sexual offenses—sufficient evidence—transactional connection—The trial court did not abuse its discretion in a sexual offenses with a child case by joining 3 September 2010 offenses and 1 July 2011 offenses for trial. The evidence was sufficient to constitute a transactional connection between the acts. **State v. McCanless, 260.**

PARTITION

Jointly held leasehold—contract—no estoppel—In an action involving the partition or sale of a leasehold in lake property as well as personal property, petitioner was not estopped by the agreement between the parties. Unlike *Properties, Inc. v. Cox*, 268 N.C. 14, in this case the trial court based its finding on the language of the parties' agreement (which did not contain any express stipulation as to partition) rather than the passage of time. **Whitesell v. Barnwell, 471.**

PARTITION—Continued

Lake property leasehold—injury to a party—In an action involving the partition or sale of a leasehold in lake property as well as personal property, respondent did not show error on the question of whether petitioner would suffer injury or substantial injury. Respondent's argument consisted of questioning the evidence of injury, but the evidence showed that petitioner would suffer injury by either being unable to sell his one-half interest or having to accept a drastically reduced price to attract a buyer wishing to share a one-half interest with respondent. **Whitesell v. Barnwell, 471.**

Relief sought under statute—defense of unclean hands—Respondent did not show error on the basis of unclean hands in an action for the partition or sale of a leasehold in lake property as well as personal property. She restated earlier equity arguments but presented no authority for an application of unclean hands in this case, where petitioner sought relief through statute rather than under the parties' agreement. **Whitesell v. Barnwell, 471.**

Sufficiency of order of sale—governing statute—Respondent did not show error with the contention that a trial court's order for the sale of a jointly owned leasehold in lake property as well as personal property was not sufficient under the requirements of N.C.G.S. § 46-22(c). The case was governed by N.C.G.S. § 46-44 rather than N.C.G.S. § 46-22(c). **Whitesell v. Barnwell, 471.**

PENALTIES, FINES, AND FORFEITURES

Civil contempt—amount—Although the trial court did not err in a civil contempt case by imposing a fine payable to plaintiffs, the amount was reversed and remanded to the trial court to make appropriate findings regarding defendant's present ability to pay the fine. **Tyll v. Berry, 96.**

PLEADINGS

Motion to amend complaint—denial of motion to dismiss—denial of motion for summary judgment—The trial court did not err in a constructive trust case by granting plaintiff leave to amend her complaint, by denying defendants' motions to dismiss pursuant to Rule 12(b)(6), and by denying defendants' motion for summary judgment. Defendants failed to present a specific argument with respect to the motion to amend, plaintiff's amendment and restatement of the complaint rendered any argument regarding the original complaint moot, and defendants' arguments regarding the summary judgment order could not amount to reversible error. **Houston v. Tillman, 691.**

PRETRIAL PROCEEDINGS

Motion to continue—denied—evidence given to defense counsel at last minute—The trial court did not err in a conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion to continue where the prosecutor presented defense counsel with a copy of statement made by an alleged co-conspirator, implicating defendant, at the very last minute. The statement did not significantly change the case to defendant's prejudice so as to require additional time to prepare for trial. **State v. Gray, 197.**

PROCESS AND SERVICE

Summons never received—directed verdict—The trial court did not err by granting defendant Integon's motion for directed verdict where plaintiff presented evidence that Integon had been served with a copy of the summons and amended complaint, but the trial court necessarily concluded that the affidavit of an employee of the registered agent of Integon rebutted the presumption of valid service by showing that Integon never received a copy of the summons. **Kahihu v. Brunson, 142.**

REAL PROPERTY

Dispute—boundary line—summary judgment—The trial court did not err in a real property dispute case by granting plaintiffs' motion for summary judgment. Plaintiffs established a prima facie case of title to the disputed land, and defendants presented no evidence by way of deeds in their chain of title to establish their superior claim to the disputed land. No genuine issue of material fact existed as to the true location of the boundary line as contemplated by the partition. **McLennan v. Josey, 45.**

SATELLITE-BASED MONITORING

Highest level of supervision and monitoring—additional findings not supported—remaining finding not sufficient—A majority of the trial court's "additional findings" of fact in a satellite-based monitoring case were not supported by competent evidence. The remaining supported "additional finding[.]" coupled with defendant's assessment as a "moderate-low" risk for committing another sexual offense, did not support the trial court's order that he enroll in the highest level of supervision and monitoring. **State v. Jones, 239.**

SCHOOLS AND EDUCATION

Assistant principal—reinstatement—notice and opportunity to be heard—A trial court order requiring that an assistant principal be reinstated was remanded where the superintendent had recommended renewal but the Board of Education (Board) decided otherwise after conducting its own investigation and effectively conducting a hearing without notice or participation by petitioner. On remand, the Board is to reach a decision after properly allowing petitioner an opportunity to be heard regarding the information that the Board intends to consider that was not included in her personnel file at the time the superintendent recommended renewal of her contract. **Tobe-Williams v. New Hanover Cnty. Bd. of Educ., 453.**

Charter school funding—funding—restricted funds—An order involving the sharing of money between the Cleveland County Schools (CSS) and charter schools was remanded for appropriate findings of fact and a determination of whether the funds at issues were "restricted" under the 2010 clarifying amendment to N.C.G.S. § 115C-426 (such amendments apply to all cases pending before the courts when the amendment is adopted, regardless of when the underlying claim arose). Money from the local current expense fund is shared with the charter schools, but not money from restricted funds. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 318.**

SEARCH AND SEIZURE

Reasonable articulable suspicion—insufficient evidence—The trial court erred by denying defendant's motion to suppress. The finding of fact that the officer had

SEARCH AND SEIZURE—Continued

recovered a stolen gun from defendant during a prior encounter with defendant was not supported by the evidence. Furthermore, under the totality of the circumstances, the police officer lacked the reasonable articulable suspicion of criminal activity needed to justify an investigatory stop. Moreover, because the stop was unlawful, defendant's subsequent consent to the officer's search of his person was invalid. **State v. Jackson, 80.**

Reasonable suspicion—driving while impaired—tip from gas station attendant—The trial court in a prosecution for impaired driving and other offenses properly denied defendant's motion to suppress all evidence stemming from the initial stop where an attendant at a gas station called in a tip, an officer was dispatched, and defendant was arrested after failing field sobriety tests. This tip was more reliable than one from a true anonymous caller because the caller was identified as an employee of the gas station, defendant was not "seized" by the officer's approach and initial questioning, and the officer's personal observations of the odor of alcohol and an unopened container of beer made during the voluntary encounter were a sufficient basis for reasonable suspicion to support a stop. **State v. Veal, 570.**

Traffic stop—no reasonable articulable suspicion—The Court of Appeals granted defendant's motion for writ of certiorari and determined that the trial court erred in a drugs case by denying defendant's motion to suppress evidence obtained after a traffic stop since defendant's consent to the search of his vehicle was given during an unlawful seizure. The officer continued to detain defendant after completing the original purpose of the stop without having reasonable articulable suspicion of criminal activity in violation of the Fourth Amendment. **State v. Cottrell, 736.**

SENTENCING

Assault on female—assault inflicting serious bodily injury—Defendant should not have been punished for committing an assault on a female where he was also convicted and sentenced for assault inflicting serious bodily injury. The prefatory clause of N.C.G.S. § 14-33(c) unambiguously bars punishment for assault on a female when the conduct at issue is punished by a higher class of assault. **State v. Jamison, 231.**

Partial retrial—increased sentence—prior record—convictions from first trial—The trial court erred on a partial retrial by increasing defendant's sentence for the charges that were joined at the first trial which resulted in convictions. None of the first trial's convictions could have been used in calculating defendant's prior record level had the jury in the first trial reached guilty verdicts on all of the charges. It would be unjust to punish a defendant more harshly simply because the jury in his first trial could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges. **State v. Watlington, 601.**

Prior record level—out-of-state conviction—felony—The trial court did not err in an assault case by calculating defendant's prior record level counting a New Jersey third-degree theft conviction as a Class I felony. New Jersey considers third-degree offenses to be the same as common law felonies and a certified criminal history record from New Jersey presented by the State that contained defendant's New Jersey Criminal History Detailed Record and listed defendant's theft convictions as felony convictions was sufficient under *State v. Lindsey*, 118 N.C. App. 549, to show that it was a felony. Furthermore, defendant failed to show that third-degree theft in New Jersey is substantially similar to a North Carolina misdemeanor. **State v. Hogan, 218.**

SENTENCING—Continued

Special probation—presumptive range—no abuse of discretion—The trial court did not abuse its discretion in a felonious breaking or entering and assault inflicting serious bodily injury case by imposing a term of special probation of 135 days in the Division of Adult Correction instead of regular probation. The sentence imposed was within the presumptive range and the record did not show that the sentence was discriminatory based on poverty. **State v. Massenburg, 609.**

SEXUAL OFFENDERS

Failure to report change of address—homeless person—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge under N.C.G.S. § 14-208.11 for failing to report a change of address as a sex offender. The State presented sufficient evidence, taken in the light most favorable to the State, that defendant was residing at some address different from the one last registered without notifying the local sheriff of a change in address. **State v. McFarland, 274.**

Failure to report change of address—insufficient conclusions of law—Although the trial court's failure to make adequate conclusions to support its decision to deny defendant's motion to suppress did not require a new trial in a failing to report a change of address as a sex offender case, the case was remanded for the trial court to make appropriate conclusions of law based upon the findings of fact with regard to defendant's motion to suppress. **State v. McFarland, 274.**

STATUTES OF LIMITATION AND REPOSE

Accident in nursing facility—ordinary negligence—statute of limitation rather than repose—The trial court erred in dismissing a negligence action arising from a falling IV stand in a long-term nursing facility as being in violation of the statute of repose. Defendant's acts or failure to act clearly involved the exercise of manual dexterity as opposed to the rendering of any specialized knowledge or skill and sounded in ordinary negligence rather than medical malpractice. Plaintiff's action was thus subject to the three-year statute of limitations set forth in N.C.G.S. § 1-52(16). **Goodman v. Living Ctrs.-Se., Inc., 330.**

Fraud—unfair trade practices—statute not expired—The trial court did not err in a fraud and unfair trade practices case by holding that the statute of limitations had not expired. Defendants concealed their misconduct, and this misconduct was reasonably discovered within the applicable statute of limitations periods. **Weaver Inv. Co. v. Pressly Dev. Assocs., 645.**

TERMINATION OF PARENTAL RIGHTS

Grounds—abandonment—notice—deportation—The trial court did not err by terminating respondent father's parental rights. The allegation of abandonment was sufficient to put respondent on notice of a potential adjudication under N.C.G.S. § 7B-1111(a)(7). Respondent's arrest and subsequent deportation did not prevent him from communicating with his children and Mecklenburg County Youth and Family Services. **In re B.S.O., 706.**

Grounds—incapable of providing care and supervision—incarceration—failure to provide viable alternative—The trial court did not err by terminating respondent's parental rights based on N.C.G.S. § 7B-1111(a)(6). Respondent was

TERMINATION OF PARENTAL RIGHTS—Continued

incapable of providing for the care and supervision of the minor child based on her incarceration, this incapacity would continue for the foreseeable future, and respondent failed to provide any viable alternative child care arrangements. **In re N.T.U., 722.**

Grounds—neglect—The trial court did not err by terminating respondent mother's parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1). The evidence and the court's evidentiary findings were sufficient to show a probability of a repetition of neglect. Respondent failed to address her mental health issues and emotional instability, and respondent had not resolved the issues of improper supervision and domestic violence that led to the children's removal from her home. **In re B.S.O., 706.**

Subject matter jurisdiction—temporary emergency jurisdiction—home state—The trial court had subject matter jurisdiction to terminate respondent mother's parental rights. The trial court properly entered the initial nonsecure custody orders pursuant to its temporary emergency jurisdiction based on the particular circumstances. North Carolina became the minor child's home state such that the trial court possessed jurisdiction to terminate respondent's parental rights pursuant to N.C.G.S. § 50A-201(a). **In re N.T.U., 722.**

Subject matter jurisdiction—venue—The trial court lacked subject matter jurisdiction to terminate respondent's parental rights to his child. The trial court erred in concluding that the Indiana court relinquished jurisdiction to North Carolina's courts by entering an order in Indiana dismissing the paternal grandparents' motion for visitation rights. Furthermore, nothing in the record evidenced a determination by the Indiana court that it no longer had exclusive, continuing jurisdiction over the minor child's case or that a North Carolina court would be a more convenient forum. **In re J.D., 342.**

TRESPASS

First degree—belief of right to enter property—instruction denied—There was no plain error in a prosecution for first-degree trespass where the trial court refused to instruct the jury on defendant's affirmative defense of a reasonable belief that he was entitled to enter the property. The jury's verdict as to larceny charges precluded a finding that defendant believed he had a legal right to enter the property. **State v. Mitchell, 423.**

TRUSTS

Constructive trust—wrongdoing not a requirement—quantum meruit—The trial court did not err by denying defendants' motion for a directed verdict and motion for judgment notwithstanding the verdict on plaintiff's quantum meruit and constructive trust claims. Plaintiff's quantum meruit claim was not submitted to the jury. Further, wrongdoing is not a requirement for imposing a constructive trust, and the record contained sufficient evidence to support the imposition of a constructive trust. **Houston v. Tillman, 691.**

UNFAIR TRADE PRACTICES

Acts occurring within partnership—no in or affecting commerce—The trial court erred in part in a fraud and unfair and deceptive trade practices case by concluding that defendants' acts were "in or affecting commerce" in North Carolina. Because the alleged misconduct of certain defendants occurred within a partnership

UNFAIR TRADE PRACTICES—Continued

or joint enterprise, it was not “in or affecting commerce” for the purposes of an unfair and deceptive trade practices action. Accordingly, the trial court erred in trebling damages as to those parties pursuant to the unfair and deceptive trade practices statute. The trial court did not err by trebling damages with regard to an independent contractor. Further, because the trial court concluded that an individual defendant was individually liable for the torts committed by the independent contractor under a veil-piercing theory, that individual was subject to the same trebling of damages and attorney’s fees to which the independent contractor was subject. **Weaver Inv. Co. v. Pressly Dev. Assocs.**, 645.

UNJUST ENRICHMENT

Damages—stipulated payments received—The trial court did not err by awarding restitution of \$101,544.50 based on quantum meruit in an action involving a residential tower, a commercial building, an office building, and a parking garage where the court found that \$101,544.50 was stipulated by the parties to be the total amount of payments that the commercial building owners (ACH) received from the office building owners (SRS) from 4 June 2008 to 31 December 2011. **SRS Arlington Offices 1, LLC v. Arlington Condo. Owners Ass’n, Inc.**, 541.

UTILITIES

Utilities Commission—exceeded authority—dismissed appeal—The Utilities Commission exceeded its authority by dismissing proposed intervenor North Carolina Waste Awareness and Reduction Network, Inc.’s appeal, including its appeal from an intervention order, for lack of standing. **In re Duke Energy Corp.**, 20.

Utilities Commission—investigation—intervention denied—no standing to appeal—Proposed intervenor North Carolina Waste Awareness and Reduction Network, Inc. was properly denied intervention into an investigation conducted by the Utilities Commission and lacked standing to appeal from the settlement order between the parties to that investigation. **In re Duke Energy Corp.**, 20.

VENUE

Motion for change—no evidence of residency—The trial court erred in a negligence case by denying defendant’s motion for change of venue. Although plaintiff alleged in his complaint that he was a citizen and resident of Harnett County where the complaint was filed, the complaint was not verified and thus, was not an affidavit or other evidence. There was no evidence in the record that plaintiff was a resident of Harnett County at the time of the filing of this action. **Kiker v. Winfield**, 363.

WORKERS’ COMPENSATION

Compensable injury—aggravation of pre-existing injury—separate injury—The Industrial Commission did not err in a workers’ compensation case by concluding that plaintiff had sustained an aggravation of a pre-existing condition without also concluding that she had suffered a disc herniation. There was no evidence that defendant attempted to “void” the Form 60 and plaintiff was not prejudiced by the Commission’s characterization of her admittedly compensable injury as an aggravation of her pre-existing condition rather than an aggravation of her condition and also a separate disc herniation. **Miller v. Mission Hosp., Inc.**, 514.

WORKERS' COMPENSATION—Continued

Further medical compensation—Parsons presumption—burden shifted back to plaintiff—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff did not need further medical compensation. Defendant had rebutted the presumption that arose by virtue of the filing of a Form 60 and pursuant to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, the burden shifted back to plaintiff to establish her continuing need for medical treatment. Plaintiff failed to meet this burden and failed to present evidence of disability. **Miller v. Mission Hosp., Inc.**, 514.

No injury by accident—findings—standard of decision—Commission's discretion—The findings of the Industrial Commission in a worker's compensation case were supported by competent evidence and supported the Commission's conclusion that plaintiff did not sustain an injury by accident where a Federal Express driver suffered a stroke while delivering packages on December 23. Plaintiff appeared to argue, without citation to authority, that when the Industrial Commission resolves contradictions in the evidence or issues of credibility, it must employ the standard applicable to appellate review, and that the Commission erred when it failed to take plaintiff's affidavit in the light most favorable to plaintiff. However, the Commission may accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted. **Hill v. Fed. Express Corp.**, 488.

No interruption of work routine—findings—The evidence in a worker's compensation case supported the Industrial Commission's findings, which supported its conclusion that a Federal Express driver who suffered a carotid dissection while delivering packages on December 23 did not experience an interruption of his work routine. The challenged portions of the Commission's findings were supported by competent evidence, plaintiff failed to articulate the legal or medical significance of the circumstances he posited as unusual, and the full Commission reviews appeals from the deputy commissioner de novo. **Hill v. Fed. Express Corp.**, 488.

Opinion and award—interest—benefits—The Full Industrial Commission erred in a workers' compensation case by failing to require defendant to pay interest on the benefits awarded to plaintiff in an opinion and award issued from the date of the initial hearing in this dispute, pursuant to N.C.G.S. § 97-86.2. **Lewis v. N.C. Dep't of Corr.**, 376.

Plaintiff no longer disabled—supported by findings—The Industrial Commission did not err in a workers' compensation case by allowing defendant to stop paying indemnity compensation to plaintiff. The Commission's conclusion that plaintiff was no longer disabled and was able to return to work was supported by the findings. **Miller v. Mission Hosp., Inc.**, 514.

WRONGFUL DEATH

Officers in individual capacities—summary judgment—no showing acts were corrupt, malicious, or outside of and beyond scope of duties—The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims of wrongful death against defendant officers in their individual capacities. The evidence viewed in the light most favorable to plaintiff did not show that the acts of the officers leading to the victim's death were corrupt, malicious, or outside of and beyond the scope of their duties. **Mills v. Duke Univ.**, 380.

ZONING

Common law vested rights—statement of claim—sufficient—Plaintiffs' claim of common law vests rights in developing property was sufficiently pled to survive a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). Taking plaintiff's allegations as true, their clearing of lots, canal digging, dune building, and road grading were substantial expenditures, their property was not zoned at the time they made their expenditures, and their expenditures were made in good faith. **Swan Beach Corolla, L.L.C. v. Cnty. of Currituck, 617.**

Harmony with surrounding area—issue of law and fact—standard of review—The issue of whether the superior court erred in a zoning case by concluding as a matter of law that the Boone Board of Adjustment considered the wrong "area" when assessing a proposed clinic's harmony with the adjacent community was reviewed as a mixed question of fact and law, applying both de novo review and the whole record test. **Templeton Props. LP v. Town of Boone, 303.**

Special use permit—harmonious with area—definition of area—fact specific—Where a zoning ordinance provided the Boone Board of Adjustment with the ability to deny a special use permit if the application would not be in harmony with the area in which it was located, a fact-specific inquiry was necessarily required to define "area." The superior court improperly acted as a finder of fact on review and imposed its view of what the bounded "area" should be, rather than reviewing whether the Board's findings of fact concerning the area were supported by competent evidence and not arbitrary and capricious. **Templeton Props. LP v. Town of Boone, 303.**

Special use permit—harmony with area—evidence sufficient to support findings—There was competent evidence in a special use zoning case supporting the Board of Adjustment's finding that a medical clinic would not be in harmony with its surrounding area and the superior court erred by overturning the Board's decision to deny the special use permit. **Templeton Props. LP v. Town of Boone, 303.**

Special use permit—prima facie case—rebuttal—Although petitioner argued that a Boone zoning ordinance allowed construction of its medical clinic under a special use permit, a prima facie case that a petitioner was entitled to a special use permit could be rebutted by competent, material, and substantial evidence that the use contemplated was not in fact in harmony with the area in which it was to be located. **Templeton Props. LP v. Town of Boone, 303.**

State constitution—tax classification—claim dismissed—The trial court did not err in a zoning case by dismissing plaintiffs' allegations under Article V, Section 2 of the North Carolina Constitution that the County had refused to allow business development on property that it had classified as business property for tax purposes. Plaintiffs did not challenge the tax classification or the uniformity of the tax rules. The tax classification of plaintiffs' property might be relevant to the "good faith" element of their vested rights claim, but their allegations were insufficient to state a claim under Article V, Section 2 of the North Carolina Constitution. **Swan Beach Corolla, L.L.C. v. Cnty. of Currituck, 617.**

Vested rights claim—exhaustion of administrative remedies—not required—Plaintiffs were not required to exhaust administrative remedies before the Currituck County Board of Adjustment in order to bring this civil action and the trial court erred by dismissing their common law vested rights claim under N.C.G.S. § 1A-1, Rule 12(b)(1). A plaintiff is not required to request that a board of adjustment issue a variance that it does not have the authority to issue. **Swan Beach Corolla, L.L.C. v. Cnty. of Currituck, 617.**